89-1175

(1)

Supreme Court, U.S.
FILED
JAN 16 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1989

NUCLEAR TRANSPORT & STORAGE, INC.,

Petitioner,

v.

UNITED STATES OF AMERICA, acting through its Department of Energy, *et al.*

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. This suit seeks, *inter alia*, declaratory and injunctive relief against Government officers and the United States to prevent continuing actions of such officers in their official capacities or under color of legal authority alleged to be unauthorized by and in violation of statute; tortious; and unconstitutional because they result in a deprivation of petitioner's property without due process.

Is the suit, as contended by the Government and held by the court of appeals, barred by sovereign immunity because petitioner supposedly has an adequate remedy in the Claims Court for money damages based on "an unconstitutional taking under the Fifth Amendment," especially where the Government has inconsistently argued to the Claims Court, and that court has held, that it has no jurisdiction to award damages based on claims under the due process clause of the Fifth Amendment?

2. Section 161(m) of the Atomic Energy Act, as amended (the Act), 42 U.S.C. § 2201(m) (1982), authorizes the Department of Energy (DOE) to "enter into agreements . . . to provide for the processing, fabricating, separating, or refining in facilities owned by [DOE] of source, by-product, or other material or special nuclear material. . . ." This authorization is subject to an express proviso requiring that DOE "establish prices to be paid by licensees for material *or services*[1] to be furnished by

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[1] Emphasis added herein unless otherwise stated.

QUESTIONS PRESENTED – Continued

[DOE] pursuant to this subsection . . . as, in the opinion of [DOE], will provide reasonable compensation to the Government for such material *or services and will not discourage the development of sources of supply independent of DOE.*" Other statutory provisions and the Act's legislative history also express a specific Congressional purpose that private enterprise be utilized to the maximum extent practicable in achieving the policies and purposes of the Act. Further, Sections 274 and 101 of the Act, 42 U.S.C. § 2021(b) and § 2131 (1982), establish a procedure under which private enterprises may be licensed to store nuclear feed material – i.e., unenriched uranium hexafluoride – for owners of electric generating plants prior to their need for its enrichment in a DOE enrichment plant.

Where a party such as petitioner has obtained a valid license to engage in the business of storing uranium hexafluoride for others prior to the need for its enrichment and has built up such a business, is it legally permissible, as contended by the Government and held by the court of appeals, for DOE and its officials thereafter to begin a program of secretly offering storage free of charge under its enrichment contracts, utilizing the subterfuge of "feed usage agreements," and thereby destroy petitioner's business and the value of its license, so as to require dismissal of a complaint concerning such destruction?

3. Section 161(v) of the Act, 42 U.S.C. § 2201(v) (1982), authorizes DOE to enter into contracts for the enrichment of uranium hexafluoride. This authorization

QUESTIONS PRESENTED – Continued

is subject to provisos requiring (a) that "any prices established under this subsection shall be on a basis of recovery of the Government's costs over a reasonable period of time," (b) that DOE "establish criteria in writing setting forth the terms and conditions under which services provided under this subsection shall be made available," and (c) "[t]hat before [DOE] establishes such criteria, the proposed criteria shall be submitted to [designated committees of the Congress] and a period of forty-five days shall elapse while Congress is in session. . . ."

Is it legally permissible, as contended by DOE and held by the court of appeals, for DOE and its officials to secretly begin offering storage of uranium hexafluoride free of charge under its enrichment contracts, utilizing the subterfuge of "feed usage agreements" not provided for under existing criteria included in DOE's own regulations, and thereby to destroy petitioner's business in storing uranium hexafluoride and the value of its license, without new rulemaking and without submitting to the appropriate Congressional committees proposed new or amended criteria setting forth the terms and conditions under which the new storage services will be provided and the Government's costs of providing them recovered, so as to require dismissal of a complaint alleging these facts?

4. Petitioner's complaint sought, in addition to declaratory and injunctive relief, *Bivens*[2]-type

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[2] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

QUESTIONS PRESENTED – Continued

constitutional tort damages against named DOE officials. The complaint spelled out (a) the sections of the Act and the DOE regulations, violation of which gave rise to petitioner's claims; (b) the vehicle of subterfuge (feed usage agreements) utilized by DOE and its named officials; (c) the role of the individual defendants with respect to such vehicle of subterfuge; (d) the period of time during which defendants' actions occurred; and (e) the effects on petitioner's business and the deprivation of its property in violation of the due process clause of the Fifth Amendment which resulted. The district court converted the individual defendants' motion to dismiss this portion of petitioner's claims for failure to state a claim on which relief could be granted into a motion for summary judgment because, in its words, "matters outside the pleadings have been submitted by the parties and considered by the court. . . ." Such matters outside the pleadings (submitted in connection with petitioner's motion for a preliminary injunction) included an affidavit by petitioner's president which, *inter alia*, attached (a) a 14-page response by DOE to petitioner's Freedom of Information Act request containing all the information DOE was willing to provide concerning its feed usage agreements; and (b) a copy of a letter, dated July 22, 1980, from DOE's Manager of Oak Ridge Operations to an official of the Atomic Energy Control Board of Canada stating that "Established DOE Policy *requires* that DOE not compete with such commercial [storage] facilities.

QUESTIONS PRESENTED – Continued

The contracts between DOE and its customers acknowledge this policy and contain appropriate termination provisions to further it"; and (c) a copy of a DOE letter, dated October 9, 1984, to petitioner's president which stated that:

> We have not reversed our longstanding policy to refrain from natural uranium storage in direct competition with private sector storage capability. . . .Under a feed usage agreement, the Department does not store customer uranium at no charge. . . .To date, feed usage agreements have been considered in only two instances, and we expect them to be required only in very limited circumstances. . . .I believe that *this policy* is reasonable and does not constitute unfair Government competition with private sector services.

DOE's response to the Freedom of Information Act request, dated September 24, 1987, showed that, by that date, feed usage agreements then in existence numbered 43 and involved DOE storage of about 16,293,456 kilograms of natural uranium as uranium hexafluoride. The material submitted to the district court also included a joint affidavit by two former DOE officials which stated that, contrary to DOE's contention otherwise, "the acceptance by DOE of feed material years in advance of need for the material by either the government or the enrichment customer constitutes free storage of such feed material." And the complaint, of course, made clear petitioner's contention that DOE's departure from its long-established practice of not providing free storage in competition with private industry violated both the Act

QUESTIONS PRESENTED – Continued

and DOE's own regulations. After the complaint was filed, the district court, on June 17, 1988, issued, on defendants' motion, a protective order relieving defendants of their obligation to respond to interrogatories and request for production of documents which had been filed by petitioner pending the filing by defendants of a motion to dismiss and disposition thereof by the court.

In such circumstances, was it proper, as contended by DOE and held by the court of appeals, for the district court to dismiss this portion of petitioner's complaint for failure to state a claim because of "lack of specificity" in pleading it?

[NOTE: Petitioner reserves the right to argue Question 5 in the event certiorari is granted on the above four questions, but does not include Question 5 among the reasons for the grant of certiorari.]

5. In a *Bivens*-type action, can the United States be joined with individual officials as a defendant?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Nuclear Transport & Storage, Inc.; and the named defendants, United States of America, acting through its Department of Energy; John S. Herrington, Secretary of Energy; Philip C. Sewell, Deputy Assistant Secretary of Energy for Uranium Enrichment; and Joe B. LaGrone, Manager, Oak Ridge Operations, Department of Energy.

Petitioner Nuclear Transport & Storage, Inc., has no parent companies or subsidiaries to list pursuant to Rule 14.1(b) and Rule 29.1.

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v.

UNITED STATES OF AMERICA, acting through its Department of Energy, *et al.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

The petitioner Nuclear Transport & Storage, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on October 17, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit has not been reported. It is reprinted in the appendix hereto, *see infra* p. A-1.

The memorandum decision of the United States District Court for the Eastern District of Tennessee (Jarvis, D.J.) is reported at 703 F. Supp. 660 (E.D. Tenn. 1988), and is reprinted in the appendix hereto, *see infra* p. A-17.

JURISDICTION

On petitioner's appeal, the Sixth Circuit on October 17, 1989, entered a judgment and opinion affirming the Eastern District's judgment. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS INVOLVED

The constitutional provision, statutes and regulations involved are the Atomic Energy Act of 1954, as amended (the Act), 42 U.S.C. §§ 2011-2296 (1982); the Department of Energy Organization Act, 42 U.S.C. §§ 7111-7315 (1982); the Administrative Procedure Act, 5 U.S.C. §§ 551-554 and 702 (1982); the Fifth Amendment to the Constitution of the United States and the regulations set out at 10 C.F.R., Pt. 762 (1989). The text of the pertinent

portions of the constitutional provision, statutes and regulations is set out in the appendix hereto, *see infra* p. A-46-59.

STATEMENT OF THE CASE

In an effort to present clearly the issues raised by this proceeding, we have in effect stated the case, or at least suggested its composition, in framing the previously stated questions presented.

Invoking federal jurisdiction under 28 U.S.C. §§ 1331 and 1337 (1982), the Fifth Amendment to the Constitution of the United States, and 28 U.S.C. § 1331 (1982), the petitioner brought this suit in the Eastern District of Tennessee. On November 29, 1988, the Eastern District granted the defendants' motion to dismiss as to the United States and the individual defendants in their official capacities for lack of subject matter jurisdiction based on the doctrine of sovereign immunity. As to the individual defendants in their individual capacities, it stated that:

> Since matters outside the pleadings have been submitted by the parties and considered by the court, the motion to dismiss for failure to state a claim upon which relief can be granted will be treated as a motion for summary judgment. *See* Rule 12(b), Fed. R. Civ. P.

and granted that motion also. The court also denied petitioner's motion for a preliminary injunction.

In summary, petitioner instituted this suit against the United States and the individual defendants seeking

declaratory and injunctive relief, and also money damages for a *Bivens*-type constitutional tort. The complaint alleged that petitioner, pursuant to the Act, as amended, had secured the necessary license, acquired and developed the necessary facilities, and engaged in the business of storing for a fee unenriched uranium hexafluoride for its customers. Petitioner is now the only private entity in the United States engaged solely in such business, and is ideally located within one mile of the Department of Energy's (DOE) only operating uranium enrichment facility at Paducah, Kentucky.

DOE announced, and for a period of time followed, the practice of not competing with private entities in the storage of unenriched uranium hexafluoride. But at least since 1984, DOE has been secretly entering into contracts, utilizing the subterfuge of "feed usage agreements," under which it provides free storage of uranium hexafluoride for enrichment customers. The complaint alleged that the individual defendants had each acted to implement, approve, carry out, and otherwise facilitate such arrangements.

The complaint further alleged that such arrangements and actions by defendants violate specified statutory provisions and DOE's own regulations; that they have largely destroyed and are continuing to destroy petitioner's business, since a private entity compelled to charge for storage services in order to survive cannot possibly compete with a government agency offering the same services free of charge; and that the effect has been to deprive petitioner of property – by destroying the value of its license and business – without due process of law in violation of the Fifth Amendment, as well as in

violation of applicable statutory and regulatory provisions.

In this latter connection, the Government sought below to portray petitioner's raising of the constitutional issue as somehow representing an abandonment of its claims based on violations of statute. The Sixth Circuit in its discussion of petitioner's claim for injunctive relief against the United States and the individual defendants as to acts in their official capacity, assumed the Government's portrayal of petitioner's position to be accurate. It stated in footnote 5 to its opinion that:

> The first three [counts of petitioner's complaint] alleged that DOE had violated the Atomic Energy Act by providing free uranium storage when it contracts to provide enrichment services. In the course of argument in the district court, plaintiff changed its theory of the case, proceeding exclusively on the basis of alleged constitutional violations.

In fact, the Government's portrayal and the above-quoted statement by the Sixth Circuit are totally incorrect and the record specifically so shows. The transcript of the argument in the district court (which was included in the Joint Appendix in the Sixth Circuit) reads in part:

> *Mr. Sitcov* [Counsel for defendants]: [I]f plaintiff concedes that they have no statutory claims . . . I will dispense with that part of the argument . . . .It seems they are not interested in pursuing the statutory claims they have set out.
>
> *Mr. Sanger* [Counsel for plaintiffs]: I think in my argument I did argue that under the supreme

> court case . . . *Huffman v. Western Nuclear*[3] that we did indeed have statutory claims.
>
> *Mr. Sitcov:* Then Your Honor I will address the particular ones they allege.

Further, to assure that there could be no question about petitioner's position on this point, petitioner in a letter to the district court relating to matters that had arisen during the argument, which letter was dated November 14, 1988, 15 days before the district court judgment and opinion, and copies of which were of course sent to counsel for defendants, stated:

> Finally . . . Defendants' counsel requested during the argument a concession that Plaintiff was not complaining of statutory violations. We regarded, and continue to regard, this request as indeed remarkable. As we pled, as we stated in our brief, and as we argued orally, plaintiff believes and contends that the actions of the defendants in this case are violative of congressional determinations in both the Atomic Energy Act of 1954, 42 U.S.C. § 2011, *et seq.* and the Department of Energy Organization Act, 42 U.S.C. § 7112.

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[3] This is 108 S. Ct. 2087 (1988) in which the Supreme Court said in footnote 11 with respect to 42 U.S.C. § 2201(v) (1982): "whether DOE, in fact, has violated § 161(v) [i.e., 42 U.S.C. § 2201(v) (1982)] by failing to impose restrictions is a question to be addressed, in the first instance, on remand after an opportunity for presentation of further evidence and further briefing." The violation of 42 U.S.C. § 2201(v) (1982) alleged in *Western Nuclear* is not the same violation of that section alleged by petitioner here, and the contexts of the allegations are very different, but *Western Nuclear* clearly illustrates, contrary to the tenor of DOE's argument, that under 42 U.S.C. § 2201(v) (1982) DOE is not free to do as it wishes.

This letter was included in the record in the court of appeals. Moreover, the portions of the transcript of oral argument and the letter quoted above were also quoted in petitioner's Reply Brief in the Court of Appeals, but were either overlooked or ignored by that Court, not even being mentioned in its opinion. It is important to observe that it is the *effect* upon petitioner's constitutionally protected property interest in its license resulting from the defendants' violation of statutes and regulations which gives rise to petitioner's claim for a violation of its Fifth Amendment due process rights. Thus, with respect to claims of statutory and constitutional violations, this action states both and cannot be characterized as stating one but not the other.

In affirming the district court's judgment of dismissal, the Sixth Circuit held, *inter alia*, that Section 10(a) of the Administrative Procedure Act, as amended, 5 U.S.C. § 702 (1988), does not authorize petitioner's suit for declaratory and injunctive relief against the United States or the individual defendants on account of the latter's acts in an official capacity because such suit should be regarded as one solely for a taking unconstitutional under the due process clause of the Fifth Amendment, and that petitioner has an adequate remedy for such taking through a suit for money damages in the Claims Court. It also held – as we read its opinion – that neither the Atomic Energy Act, as amended, nor DOE's regulations were violated by DOE's provision of free storage, and that petitioner therefore has neither "a constitutionally protected right to provide storage services under its license free of government competition or . . . a

predetermination hearing when there is a change of policy [to one of providing free storage in competition with petitioner]." [*Nuclear Transp. & Storage, Inc. v. United States*, No. 89-5052, op. at 14-15; app. at A-14.) It further held that petitioner's *Bivens*-type claim for money damages against the individual defendants in their individual capacities was subject to dismissal because of "lack of specificity" in pleading it, and that the United States cannot be named as a defendant in advancing such a claim because of sovereign immunity.

REASONS FOR GRANTING THE WRIT

I.

Acceptance By The Sixth Circuit Of The Government's Contention That Declaratory And Injunctive Relief Is Barred By Sovereign Immunity Because Petitioner Has An Adequate Remedy In The Claims Court For Money Damages Based On "An Unconstitutional Taking" Conflicts With Decisions Of This Court, Other Circuits, And The Claims Court, And With What The Government Has Itself Argued To The Claims Court.

It has long been the rule that actions by a government officer which are unconstitutional or in excess of his statutory authority can be enjoined (or, of course, made the subject of declaratory relief). *E.g., Philadelphia Co. v. Stimson*, 223 U.S. 605, 620 (1912); *Wisconsin v. Baker*, 698 F.2d 1323, 1332 (7th Cir.), *cert. denied*, 463 U.S. 1207 (1983); *Springdale Convalescent Center v. Mathews*, 545 F.2d 943, 951 (5th Cir. 1977). In 1976, the Administrative Procedure Act, 5 U.S.C. § 702, was amended, Pub. L. 94-574, 90 Stat. 2721, for the express purpose of strengthening the rule by

waiving sovereign immunity and authorizing suits in such circumstances against the United States as well as the officers concerned. As stated in the Senate Committee Report on the amendatory legislation:

> Congress has made great strides toward establishing monetary liability on the part of the Government for wrongs committed against its citizens by passing the Tucker Act of 1875 . . . and the Federal Tort Claims Act of 1946. . . .*S.800 would strengthen this accountability by withdrawing the defense of sovereign immunity in actions seeking relief other than money damages, such as an injunction, declaratory judgment*, or writ of mandamus [S. Rep. No. 996, 94th Cong., 2d Sess. 3-4 (1976)].

The Sixth Circuit's resurrection of the sovereign immunity defense flies in the face of both statutory and decisional law, and we believe requires this Court's attention.

Further, the Sixth Circuit's action involves special circumstances which add to that action's defectiveness. As noted in the Statement of the Case, *supra*, the Sixth Circuit proceeded on the assumption that, during the argument in the district court, petitioner had abandoned claims of statutory violations and was relying solely on a constitutional violation as a basis for injunctive and declaratory relief in the face of express statements by petitioner in the district court that it was doing no such thing (and the Sixth Circuit's later discussion of the statutory claims in another connection). We know of no principle empowering a court to transform a party's position into the opposite of what that party has stated its position to be.

Finally, even apart from petitioner's reliance on statutory violations as well as a violation of due process, the Government's contention that declaratory and injunctive relief was barred by sovereign immunity because petitioner had an adequate remedy in the Claims Court for money damages based on an "unconstitutional taking"[4] in violation of the due process clause of the Fifth Amendment, and the Sixth Circuit's acceptance of that contention, go directly counter to what the Government has told the Claims Court and what that court has held. The Sixth Circuit's opinion, after quoting 5 U.S.C. § 702 (1988) waiving sovereign immunity, states that:

> The government contends that waiver of sovereign immunity under the APA only applies where there exists no other adequate remedy in a court, 5 U.S.C. §703, and that if plaintiff's claim is characterized as an unconstitutional taking in violation of the Fifth Amendment, it would have an adequate remedy in the Court of Claims.
>
> * * *
>
> The constitutional tort which Nuclear Transport is alleging is that DOE denied it due process by

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[4] A taking by the Government which is authorized is not an unconstitutional taking at all but merely one for which the Government is constitutionally obliged to pay compensation under a contract implied in fact and for which a suit may be maintained in the Claims Court under that Court's Tucker Act jurisdiction. *Hurley v. Kincaid*, 285 U.S. 95, 103-04 (1932). Statutory violations which result, as here, in depriving petitioner of its business and license constitute a deprivation without due process of law (*Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983)) and a constitutional tort which is unlawful and over which the Claims Court would have no jurisdiction.

violating the Atomic Energy Act. It is thus in actuality asserting a statutory claim in constitutional guise.[5] [Footnote 5 states that petitioner abandoned its statutory claims.] We find that plaintiff fails to state a claim that the Atomic Energy Act has been violated. Plaintiff's constitutional claim for the denial of due process stripped of the alleged violations of the statute is properly characterized as an unconstitutional taking under the Fifth Amendment, a claim which is properly brought in the Court of Claims, not in this court. [*Nuclear Transp. & Storage, Inc. v. United States*, No. 89-5052, op. at 9-10; app. at A-9-10.]

By contrast, the Government, in its reply brief in *Cabrera v. United States*, 10 Cl. Ct. 219 (1986), filed on June 9, 1986, argued to the Claims Court as follows:

2. This Court lacks jurisdiction *over plaintiff's due process claim*

In Count II of his complaint, plaintiff seeks damages equal to the value of the seized vessel for an alleged violation of his Fifth Amendment right to due process. We moved to dismiss Count II because 28 U.S.C. § 1491 only grants this Court jurisdiction of claims which are based upon provisions of statutes or the Constitution which themselves authorize awards of money damages. *Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 465 n.5 (1980). As this Court's predecessor, the Court of Claims, stated in *Eastport S.S. Corp. v. United States*, 178 Ct. Cl. 599, 372 F.2d 1002 (1967):

> Under Section 1491 what one must always ask is whether the constitutional clause or the legislation which the claimant cites can be fairly interpreted as mandating compensation

> by the Federal Government for the damage sustained. If not, this court cannot give relief under Section 1491.

178 Ct. Cl. at 607, 372 F.2d at 1009. Accordingly, since the due process clause of the Fifth Amendment does not authorize awards of money damages, *Alabama Hospital Ass'n v. United States*, 228 Ct. Cl. 176, 180, 656 F.2d 606, 609 (Ct. Cl.), *cert. denied*, 456 U.S. 943 (1981), we asked the Court dismiss Count II of plaintiff's complaint for lack of jurisdiction. Defendants' Reply to the Response of Plaintiff to Defendants' Motion to Dismiss for Failure to State a Claim at 4-5, *Cabrera v. United States*, 10 Cl. Ct. 219 (1986).

In its decision in *Cabrera* the Claims Court agreed, holding:

> Plaintiff also asserts his right to relief in this Court upon the ground that his constitutional guarantee of due process of the law has been violated. Plaintiff's claim must be dismissed because this Court does not have jurisdiction over violations of the due process clause of the fifth amendment.
>
> Although 28 U.S.C. § 1491(a)(l) (1982) grants this Court jurisdiction over claims which are founded upon the Constitution and are against the United States, it is well settled that this Court's jurisdiction extends only to claims upon which monetary damages are mandated. *E.g., United States v. Testan*, 424 U.S. 392, 400, 96 S.Ct. 948, 954, 47 L.Ed.2d 114 (1976); *Eastport S.S. Corp. v. United States*, 178 Ct. Cl. 599, 607, 372 F.2d 1002, 1009 (1967); *Shaw v. United States*, 8 Cl. Ct. 796, 800 (1985); *Prevado Village Partnership v. United States*, 3 Cl. Ct. 219, 229 (1983); *Royce v. United States*, 1 Cl. Ct. 225, 226 (1982) [10 Ct. Cl. at 221-22].

The Government made the same kind of argument in a brief filed on March 17, 1986, in the Claims Court in *Montego Bay Imports, Ltd. v. United States*, 10 Cl. Ct. 806 (1986). (See Defendants' Motion for Summary Judgment (including supporting brief) at 8-9, *Montego Bay Imports, Ltd. v. United States*, 10 Cl. Ct. 806 (1986).) The Claims Court again agreed, saying that "claims for solely due process violations are not within this Court's jurisdiction" citing *Cabrera* and other cases [see 10 Cl. Ct. at 809].

In short, if a party seeks money damages for a due process violation in the Claims Court, the Government argues and that court holds (we think correctly) that it has no jurisdiction. Here, where petitioner sought injunctive and declaratory relief with respect to such a violation (as well as statutory violations) in a district court, the Government has argued and the Sixth Circuit has held that the district court was without jurisdiction because the Claims Court does have jurisdiction.

We think that the Government's and the Sixth Circuit's actions would, if uncorrected, reduce citizen rights in this type of case – about which Congress was so solicitous when it adopted the 1976 amendment to 5 U.S.C. § 702 – to those of participating in a type of shell game. Consideration and correction of the Sixth Circuit's decision by this Court are therefore essential.

II.

The Sixth Circuit's Holding That The Last Proviso To Section 161(m) Of The Act, 42 U.S.C. § 2201(m) (1982), Prohibits Only DOE Pricing Which Will Discourage Private Supplying Of Unenriched Uranium, And Not Of Private Services Relating To Unenriched Uranium, Is Not Only A Total Misreading Of The Statutory Language But Would Frustrate The Expressed Purpose Of Congress In Adopting It.

As indicated in Question 2, Section 161(m) of the Act, 42 U.S.C. § 2201(m) (1982), contains a final proviso reading:

> *And provided further,* that [DOE] shall establish prices to be paid by licensees for material *or services* to be furnished by [DOE] pursuant to this subsection, which prices *shall* be established on such a nondiscriminatory basis as, in the opinion of [DOE], will provide reasonable compensation to the Government for such material *or services* and will not discourage the development of sources of supply independent of [DOE].

The Sixth Circuit read this pricing requirement as applying only to supplying of unenriched uranium and not of services relating thereto, saying:

> 42 U.S.C. §2201(m) does not apply to plaintiff since that section deals only with the impact of DOE charges on sources of supply and plaintiff is not a supplier of unenriched uranium. (*Nuclear Transp. & Storage, Inc. v. United States,* No. 89-5052, op. at 12; app. at A-11.)

This is contrary not only to the statutory language itself, which we think clearly applies to sources of supply of services, as well as of materials, but to the expressed

purpose of Congress and the recognition by all concerned of what the legislation meant at the time of its enactment.

At the June 2, 1954 hearing on the legislation before the Joint Committee on Atomic Energy, representatives of the Atomic Energy Commission, DOE's predecessor, presented a lengthy prepared statement which said, with respect to Section 161(m):

> Commission-furnished materials *and services:* Section 161(m) provides needed authority for the Commission to make long-term contracts to supply licensees with *services* and materials . . . needed in the initial stages of the new industry . . . . Section 161(m) also establishes pricing criteria which would *require* the Commission to establish its prices for materials *or services* on such a nondiscriminatory basis as in the Commission's opinion will provide reasonable compensation to the Government *and will not discourage development of independent sources of supply* . . . . We endorse these provisions. [S. 3323 and H. R. 8862, To Amend the Atomic Energy Act of 1946: Hearings Before the Joint Committee on Atomic Energy, 83d Cong., 2d Sess. 601-02 (1954) (Statement of the Atomic Energy Commission)].

The report on the legislation by the Joint Committee on Atomic Energy stated flatly:

> Section 161 permits the Commission to . . . enter agreements with licensees under Section 103 or 104 to provide *services* or materials to such licensees *where those services* and materials *are not otherwise commercially available* . . . . [S. Rep. No. 1699, 83d Cong., 2d Sess. 26 (1954)].

The purpose of Congress was thus perfectly clear. The Commission and its successors were authorized to

provide services to licensees such as owners of electric generating plants, but at prices which would not discourage development of private sources of supply of such services. Once private sources of supply of services became available, the intent apparently was that the Government not provide such services at all, much less free of charge so that the private sources could not possibly compete and would be destroyed.

This purpose accords with the basic philosophy expressed elsewhere in the Act and in other related legislation as well. Thus, Section 1 of the Act, 42 U.S.C. § 2011 (1982), declares it to be "the policy of the United States that . . . (b) the development, use and control of atomic energy shall be directed so as to . . . strengthen free competition in private enterprise." The Department of Energy Organization Act, 42 U.S.C. § 7112 (1982), similarly states it to be "the purpose" thereof

> (14) to assure, *to the maximum extent practicable, that the productive capacity of private enterprise shall be utilized* in the development and achievement of the policies and purposes of this chapter. . . .

Thus, the Sixth Circuit's interpretation and application of Section 161(m) of the Act are not merely in error, but would utterly defeat the clearly expressed purpose of Congress. Accordingly, review and correction by this Court of the Sixth Circuit's holding are essential.

III.

The Sixth Circuit's Holding That Under Section 161(v) Of The Act, As Amended In 1964, DOE's Obligation To Recover Costs Is "Flexible" To The Point Of Authorizing Non-Recovery Of Storage Costs Ignored The 1970 Amendment Clarifying DOE's Obligations With Respect To Cost Recovery, And Would, Again, Defeat The Clearly Expressed Intention Of Congress.

Section 161(v) of the Act, 42 U.S.C. § 2201(v) (1982), requires that prices charged by DOE for enrichment services "be on a basis of recovery of the Government's costs over a reasonable period of time." It further directs that DOE "establish criteria in writing" under which "[such] services . . . shall be made available," and that such criteria be submitted to appropriate committees of Congress and not become effective until "a period of forty-five days shall elapse while Congress is in session."

Petitioner's complaint alleged that DOE was violating these statutory provisions by secretly providing storage service to enrichment customers free, thus recovering *no* costs on account of such service, and this allegation was supported by an affidavit of two former DOE officials which was considered by the court (*see infra*, app. at A-110). The complaint further alleged that such free storage was unauthorized under DOE's own regulations establishing criteria, 10 C.F.R. Pt. 762 (1989), and was being offered without prior rulemaking as required by the Act and the Administrative Procedure Act.

The court of appeals discussed these allegations in a single five sentence paragraph of its opinion. It stated that the statutory provision mandating cost recovery

"does not require DOE to charge on an itemized basis for every cost incurred," and that "The legislative history of the Act indicates that cost recovery is to be flexible." (*Nuclear Transp. & Storage, Inc. v. United States*, No. 89-5052, op. at 13; app. at A-12.) The legislative history which it cited and on which it relied was the Senate Committee Report on the 1964 amendment to the Act which added thereto Section 161(v).

Incredibly, the court evidently did not realize that the 1964 language was amended in 1970 and that a basic purpose of the 1970 amendment was to make clear that DOE's predecessor agency, and now DOE itself, does *not* have the kind of flexibility they claimed to have under the 1964 language. As pointed out by the Acting Comptroller General in a legal opinion dated February 19, 1986, which had been requested by the chairman of a subcommittee of the House Committee on Energy and Commerce:

> The pricing standard provided in [Section 161(v) as enacted in 1964] was admittedly the flexible one of "reasonable compensation to the Government." However, subsection 161(v) was amended in 1970 specifically to change the pricing standard to one of "recovery of the Government's costs over a reasonable period of time." *It is the legislative history associated with the 1970 amendment that is now relevant and not that of the predecessor version of the statute.*
>
> [I]n the reports of the Joint Committee on Atomic Energy associated with the 1970 amendment, the Joint Committee explicitly affirmed a GAO legal interpretation of the meaning of subsection 161(v) as the Committee's intended meaning of the new statutory language . . . . GAO's opinion required the recovery of

> costs in every instance except one, namely, the situation for which the Conway Formula had been devised to deal with the reduction or possible elimination of the military need for enriched uranium. *Flexibility and consideration of the national interest were directed specifically and solely to this particular problem.* . . . [T]he interim period for which the Conway Formula applied expired in 1976 and is no longer relevant. *Consequently, under the 1970 amendment to subsection 161(v) and its legislative history, full cost recovery is required.* (footnotes omitted) [DOE Uranium Enrichment Program: Hearing Before the Subcommittee on Energy Conservation and Power of the House Committee on Energy and Commerce, 99th Cong., 2d Sess., Ser. No. 99-109, 173-74 (1986).]

Thus, the court of appeals decision accords pricing "flexibility" to DOE on the basis of legislative history pertaining to statutory language which no longer exists, and in the face of legislative history pertaining to the new statutory language which shows that it was intended to deny the very "flexibility" which the court of appeals accords. We think the need for this Court's intervention is apparent.[5]

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[5] As also pointed out by the Acting Comptroller General in the legal opinion included in the House subcommittee report quoted above, the reports of the Joint Committee on Atomic Energy relating to the original and less restrictive 1964 version of Section 161(v) "directed that 'the charges for enrichment services' be set out in the criteria." (*Id.* at 176.) DOE adopted amended criteria in 1986, 10 C.F.R. Pt. 762 (1989). No provision for free storage services was included in either the new or the former criteria. Also, under Section 501(b)(3) of the Department of Energy Organization Act, 42 U.S.C. § 7191(b)(3)

(Continued on following page)

IV.

The Sixth Circuit's Holding That The Complaint, Especially When Reinforced By The Materials Considered By The District Court In Treating The Individual Defendants' Motion To Dismiss As One For Summary Judgment, Did Not State A *Bivens*-Type Claim On Which Relief Could Be Granted Because Of "Lack Of Specificity" Made A Mockery Of Rules 8 And 56 Of The Federal Rules Of Civil Procedure Promulgated By This Court, And Its Action Was Rendered Even More Egregious By The District Court's Protective Order Which Made It Impossible For Petitioner To Obtain Additional Information Through Discovery.

Rule 8(a) of the Federal Rules of Civil Procedure promulgated by this Court requires only (apart from a statement as to jurisdiction and a demand for judgment, neither of which is here involved) that a complaint "contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief . . . ." Subsections (e) and (f) of Rule 8 further provide that "[e]ach averment of a pleading shall be simple, concise and direct" and that "[a]ll pleadings shall be so construed as to do substantial justice." Under Rule 56(c), a summary judgment may be

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(Continued from previous page)

(1982), DOE's rules, regulations and orders are subject to the notice and comment rulemaking requirements of the Administrative Procedure Act, 5 U.S.C. § 553 (1988), *even where unlike the situation with respect to agencies generally, they relate to public property or contracts.* DOE has never provided for free storage service through rulemaking. The court of appeals referred to very general provisions in 10 C.F.R. §§ 762.4, 762.7 and 762.14 (1989) which say nothing about free storage service and which, if construed to authorize such service, would conflict with the statutory criteria requirements as well as DOE's own regulations at 10 C.F.R. § 762.5(a) and (d) (1989).

granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The Sixth Circuit held, relying on its own prior decision in *Chapman v. City of Detroit*, 808 F.2d 459 (6th Cir. 1986), and that of the Fifth Circuit in *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985), both of which held that complaints alleging mere conclusions rather than facts in suits against state and local officials under 42 U.S.C. § 1983, that what it called a similar "heightened pleading requirement" should be applied in a *Bivens*-type action and that petitioner had not met it.

We note first that, of course, no inferior federal court can alter a rule promulgated by this Court, and that prior inferior federal court decisions in conflict with such a rule are wholly ineffective. In *Mason v. United States*, 412 U.S. 391, 396 (1973), this Court noted its "difficulty in comprehending how decisions by lower courts can ever undermine the authority of a decision of this Court." The same difficulty is presented with at least equal force in the case of lower court decisions at variance with rules promulgated by this Court.

Further, the complaint here did plead facts rather than conclusions and with great specificity. This included specification of the Act and regulations alleged to have been violated; the vehicle of subterfuge ("feed usage agreements") used by defendants; the role of the individual defendants with respect to such vehicle of subterfuge; the time period during which defendants played such

role; and the resultant damage to petitioner. Thus, petitioner spelled out (1) the legal standard defendants were required to follow; (2) the illegal methodology used by defendants; (3) the actions of defendants relating to such methodology; (4) the time period during which defendants' actions took place; and (5) the damage which petitioner sustained. For the court of appeals to hold – without any extended discussion – that such allegations were conclusory rather than factual or that they were insufficient under any standard seems to us not merely wrong but fantastic and an outright refusal to comply with Rule 8.[6]

The Sixth Circuit's action becomes even more flagrant in light of the fact that – as the Sixth Circuit itself expressly recognized (*Nuclear Transp. & Storage, Inc. v. United States*, No. 89-5052, op. at 4 and 17, n. 8; app. at A-5 and A-16) – the district court considered the matters outside the pleadings submitted to it in connection with petitioner's motion for a preliminary injunction and, accordingly as required by Rule 12(b) of the Federal Rules of Civil Procedure, treated the individual defendants' motion to dismiss the complaint as one for summary judgment. Those submitted matters outside the pleadings included affidavits setting out in great detail what the defendants had done, why their actions were illegal, and

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[6] The "heightened pleading requirement" adopted by the Sixth Circuit is a misapplication of the Supreme Court's admonition in *Butz v. Economou*, 438 U.S. 478, 507-508 (1978) and *Harlow v. Fitzgerald*, 457 U.S. 800, 818-820 (1982) on dismissing insubstantial constitutional tort suits against public officials.

how petitioner had been damaged by them. The material submitted by the parties raised material issues of fact, including the basic issue of whether DOE contracts actually involved free storage, an issue referred to by the court of appeals in its opinion. (*Id.* at 13, n. 6; app. at A-13.)

Moreover, such materials included a letter from DOE responding to petitioner's Freedom of Information Act request which contained all the information DOE was willing to provide concerning the matters in issue. The district court, by its protective order, prevented petitioner from obtaining any additional information from any of the defendants. Thus, the Sixth Circuit held in effect that the very large amount of specifics actually provided by petitioner was somehow insufficient, and that "insufficiency" was a basis for summary dismissal, even though the district court itself, by its protective order, had prevented petitioner from obtaining and presenting additional specifics. This amounts to a judicially created Catch-22. To permit it and the Sixth Circuit's holding on this point generally to stand would be to sanction a retrogression of a century and a half from the Federal Rules of Civil Procedure to precepts such as those contained in *Chitty On Pleading* and to what Charles Dickens described as the practice of "members of the [Government] bar . . . tripping . . . [others] up on slippery precedents, groping knee-deep in technicalities . . . and making a pretense of equity with serious faces, as players might." C. Dickens, *Bleak House*, p. 2 (Bantam Classic Ed. 1983). Again, the necessity for review and correction by this Court is evident.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

No. 89-5052

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NUCLEAR TRANSPORT & STORAGE, INC., Plaintiff-Appellant, vs. UNITED STATES OF AMERICA, Defendant-Appellee.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE (Filed Oct. 17, 1989)

BEFORE: MARTIN and MILBURN, Circuit Judges; and CONTIE, Senior Circuit Judge.

PER CURIAM. Plaintiff-appellant, Nuclear Transport & Storage, Inc. (Nuclear Transport), appeals from the order of the district court granting the United States', defendant-appellee's, motion to dismiss for failure to state a claim and lack of subject matter jurisdiction, treating it in part as a motion for summary judgment, and denying plaintiff's motion for a preliminary injunction and declaratory relief. For the following reasons, we affirm the order of the district court.

I.

Plaintiff-appellant Nuclear Transport is the holder of a radioactive material license issued by the Cabinet for Human Resources of the Commonwealth of Kentucky. The license is required by and granted pursuant to the

Atomic Energy Act ("the Act"), 42 U.S.C. § 2131 (1982),[1] to store unenriched uranium hexaflouride (nuclear feed material). Nuclear Transport is the operator of a facility which stores unenriched uranium feed material owned by utilities and other private entities until it is ready to be enriched[2] by the Department of Energy (DOE) so that it may be used as fuel in nuclear power generators.

Nuclear Transport alleges that DOE, in a change from prior policy and in violation of the Atomic Energy Act, 42 U.S.C. §§ 2011-2296 (1982), has deprived it of its property interest in its license by providing free storage of unenriched uranium under the guise of feed usage agreements. Nuclear Transport alleges that because it was encouraged by DOE assurances that the federal government did not intent to provide storage services to its enrichment customers, it developed facilities for storage

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[1] Under the Act, nuclear "source materials" may not be transferred or received without a license. 42 U.S.C. § 2092. Source materials are defined at 42 U.S.C. § 2014(z). Pursuant to the Act, 42 U.S.C. § 2021(b), the Department may, by agreement, delegate its licensing authority to individual states, and has done so in Kentucky.

[2] Enrichment is a process in which the radioactive isotope, U-235, in the uranium is increased from one percent to three percent in order to make nuclear fuel suitable for use in nuclear generating plants. It is the most expensive phase of the nuclear fuel cycle and, thus, is not undertaken by utilities until just before the fuel is needed. Presently, the only enrichment facility in operation in the United States is owned by the federal government, acting through DOE, at Paducah, Kentucky. Since 1984 Nuclear Transport has been the only private company in the business of storing nuclear fuel, holding it for the utilities until it is ready to be enriched.

of 2,150 cylinders of feed material, but since 1984 because of DOE's alleged secret activities in negotiating feed usage agreements, its business has declined by approximately 75%.

DOE enters into feed usage agreements with some of its enrichment customers. Under a feed usage agreement, DOE takes title to the nuclear feed material which a customer wishes to deliver to DOE in advance of the date calculated for enrichment and DOE determines that it is to DOE's advantage to accept early delivery. DOE maintains that among the advantages that may arise from early delivery are obtaining a steady supply of unenriched uranium to keep the plants in operation, flexibility in operating the enrichment plants, and increasing the nation's stockpile of enriched uranium. Because of the exigencies of scheduling, the unenriched uranium received by DOE is in many cases not the same enriched uranium ultimately delivered to the customer and, thus, DOE argues, no actual "storage" of a customer's uranium occurs at all.

Nuclear Transport alleges that DOE's motive for entering into feed usage agreements as part of its enrichment contracts is to provide free storage to enrichment customers who otherwise would give their enrichment business to competitors of DOE in foreign countries who provide free storage of unenriched uranium.

Nuclear Transport's complaint in this action sought injunctive and declaratory relief against DOE to prevent future storage and money damages in excess of five million dollars, alleging that DOE had violated the Atomic Energy Act and denied plaintiff the value of its license

without due process of law. In addition to the United States, three DOE officials were named as defendants in their official and individual capacities. During the course of argument, Nuclear Transport characterized the alleged statutory violations as *Bivens*-type constitutional torts.

The district court dismissed plaintiff's claims for lack of subject matter jurisdiction and failure to state a claim.[3] The court held that plaintiff's claims for damages against the United States and the individual defendants in their official capacities were barred by sovereign immunity. It held that plaintiff's *Bivens* claim against the individual defendants was barred because plaintiff had failed to allege any factual connection between the actions challenged and the named defendants. Finally, the district court held that plaintiff had failed to state a claim for the deprivation of a constitutionally protected property interest. The court stated that because it had considered matters outside the pleadings,[4] it was transforming the government's 12(b)(6) motion to a motion for summary

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[3] The district court found that plaintiff had standing because it alleged a distinct and palpable injury which was fairly traceable to the alleged actions of DOE, and assuming that plaintiff could state and prove a *Bivens* claim against the individual defendants, relief from the injury would likely follow.

[4] DOE submitted an affidavit in opposition to Nuclear Transport's motion for a preliminary injunction. Nuclear Transport responded with an affidavit of its own. DOE then submitted three letters which contained statements that impeached one of Nuclear Transport's affiants.

judgment. Because the court found that plaintiff had failed to state a claim for relief, it also denied its motion for a preliminary injunction and declaratory relief.

Nuclear Transport timely filed this appeal.

II.

This court must first decide whether the district court committed reversible error by treating the government's motion to dismiss under Rule 12 as a motion for summary judgment under Rule 56 without giving the parties reasonable opportunity to respond.

Fed. R. Civ. P. 12(b) states in relevant part:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Rule 56(c) states: "The motion shall be served at least 10 days before the time fixed for hearing."

Nuclear Transport argues that it was not notified of the court's decision to convert the government's Rule 12(b)(6) motion for failure to state a claim into a Rule 56 motion for summary judgment and was denied an opportunity to present all pertinent material.

This court has held that conversion to summary judgment without usual notice to the parties is ground for

reversal only when the conversion results in prejudice. *Hoopes v. Equifax, Inc.*, 611 F.2d 134, 136 (6th Cir. 1979). We find that no prejudice can be shown. The district court assumed the allegations of the complaint and ultimately dismissed plaintiff's claim for lack of jurisdiction and failure to state a claim. The district court in essence determined that plaintiff failed to state a claim because it found as a matter of law that there was no statutory violation or violation of policy which resulted in a denial of due process. In *Oppenheimer v. Morton Hotel Corp.*, 324 F.2d 766, 768 (6th Cir. 1963), this court held that it would be a useless procedure to reverse the district court for failure to provide ten days to respond to a summary judgment motion if only a substantive law question is involved. Plaintiff in the present case cannot show how the opportunity to submit additional material would have any effect on the court's analysis. Therefore, we hold that the district court did not commit reversible error in granting summary judgment.

III.

Nuclear Transport next argues that the district court erred in holding that its claims for damages and injunctive relief against the United States and the individual defendants in their official capacities were barred by the doctrine of sovereign immunity.

The United States Supreme Court held in *United States v. Mitchell*, "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction. 463 U.S. 206, 212 (1983). *See also United States v. Sherwood*, 312 U.S.

584, 586 (1941); 14 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3654, p. 186 (2d ed. 1985). The doctrine of sovereign immunity acts as a bar to suit against the United States unless there has been an explicit waiver by the government. *United States v. Testan*, 424 U.S. 392, 399 (1976).

A.

The Tucker Act states in pertinent part:

> The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491. The Supreme Court in *Mitchell* held that the Tucker Act constitutes a waiver of sovereign immunity with respect to the specified type of claims. 463 U.S. at 212.

Nuclear Transport argues that the claim it is making against the government is one sounding in tort and thus the Court of Claims is not the appropriate court for it to pursue its damage claim. It contends that it is bringing a *Bivens* action against the government and the individual defendants in their official capacities for the commission of a constitutional tort and that *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), constitutes a waiver of sovereign immunity.

We find no merit in this argument. Justice Harlan in his concurrence in *Bivens* noted, "[h]owever desirable a

direct remedy against the Government might be as a substitute for individual official liability, the sovereign still remains immune to suit." 403 U.S. at 410 (Harlan, J. concurring). This court in *Mid-South Music Corp. v. U.S. Dep't of the Treasury* has held, "Since the United States has not waived its sovereign-immunity and consented expressly to be sued in a *Bivens*-type action, such suits cannot be brought against the United States." 579 F. Supp. 481, 483 (1983), *aff'd in part, rev'd in part*, 756 F.2d 23 (6th Cir. 1984). Other circuits agree. *See Holloman v. Watt*, 708 F.2d 1399, 1402 (9th Cir. 1983), *cert. denied*, 466 U.S. 958 (1984); *Boda v. United States*, 698 F.2d 1174, 1176 (11th Cir. 1983); *Garcia v. United States*, 666 F.2d 960, 966 (5th Cir.), *cert. denied*, 459 U.S. 832 (1982); *Contemporary Mission, Inc. v. U.S. Postal Serv.*, 648 F.2d 97, 104 n.9 (2d Cir. 1981).

The Atomic Energy Act, which plaintiff alleges has been violated, contains no waiver of sovereign immunity. Because Nuclear Transport points to no statutory or judicial waiver of immunity that would allow it to pursue its damage claim against the United States, we find that the damage claim is barred by the doctrine of sovereign immunity.

B.

Nuclear Transport argues that a waiver of sovereign immunity for its claim for injunctive and declaratory relief is found in the Administrative Procedure Act (APA), 5 U.S.C. § 702, which provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial

> review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States. . . .

The government contends that waiver of sovereign immunity under the APA only applies where there exists no other adequate remedy in a court, 5 U.S.C. § 703, and that if plaintiff's claim is characterized as an unconstitutional taking in violation of the Fifth Amendment, it would have an adequate remedy in the Court of Claims.

Nuclear Transport argues that it is not alleging an unconstitutional taking under the Fifth Amendment. A taking claim implies that the government has a right to the property, but has not proceeded according to due process requirements. Nuclear Transport instead alleges the deprivation of property through tortious acts and argues that the Court of Claims lacks jurisdiction to review allegations of tortious government action. *NL Indus., Inc. v. United States*, 12 Cl. Ct. 391, 396 (1987), *aff'd*, 839 F.2d 1578 (Fed. Cir.), *cert. denied*, 109 S.Ct. 63 (1988).

The constitutional tort which Nuclear Transport is alleging is that DOE denied it due process by violating the Atomic Energy Act. It is thus in actuality asserting a

statutory claim in constitutional guise.[5] We find that plaintiff fails to state a claim that the Atomic Energy Act has been violated. Plaintiff's constitutional claim for the denial of due process stripped of the alleged violations of the statute is properly characterized as an unconstitutional taking under the Fifth Amendment, a claim which is properly brought in the Court of Claims, not in this court.

IV.

Nuclear Transport next argues that it has been deprived of the value of its license without due process of law. Nuclear Transport contends that it has been deprived of its property interest in its license to store unenriched uranium, relying on *Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983). In *Reed*, the Seventh Circuit held that plaintiffs had a constitutionally protected property interest in a liquor license, which had not been formally revoked, but allegedly had been stripped of its value by relentless, baseless prosecutions on the part of the government. 704 F.2d at 949.

Nuclear Transport argues that in a similar manner it has been deprived of the value of its license, because DOE acted illegally in violation of the Atomic Energy

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[5] Plaintiff's complaint charged four counts of unlawful conduct. The first three alleged that DOE had violated the Atomic Energy Act by providing free uranium storage when it contracts to provide enrichment services. In the course of argument in the district court, plaintiff changed its theory of the case, proceeding exclusively on the basis of alleged constitutional violations.

Act, DOE's own regulations, and DOE's long-standing practices by providing free storage of unenriched uranium. It is plaintiff's position that it was denied the process that was due when DOE failed to comply with the procedural requirements of the Atomic Energy Act which would have given plaintiff notice and an opportunity to be heard. Unless Nuclear Transport can point to a specific provision of the Act or DOE regulations which has been violated, this allegation fails.

After examining each of plaintiff's statutory contentions in turn, we conclude that plaintiff can identify no interest that would entitle it to notice or a hearing prior to DOE's alleged actions.

The statement of purpose prefacing the Department of Energy Organization Act, 42 U.S.C. § 7112(14), that one of the goals of the United States is to assure, to the maximum extent practicable, that private enterprise shall be utilized in the atomic energy field is a general policy statement that does not confer any specific rights on plaintiff or anyone else engaged in the atomic energy field, nor does it place restrictions on DOE's discretion in implementing this policy. 42 U.S.C. § 2201(m) does not apply to plaintiff since that section deals only with the impact of DOE charges on sources of supply and plaintiff is not a supplier of unenriched uranium.

42 U.S.C. § 2201(v) authorizes DOE to enter into contracts for uranium enrichment, establish written criteria setting the terms and conditions under which services shall be made available, and requires that written criteria be submitted to Congress for 45 days before becoming

finally established. It also provides that any prices established be recovered by the Government over a reasonable period of time. Plaintiff's claim essentially is that there is nothing in this provision that states that a feed usage agreement that allows free storage may be made part of an enrichment contract. Plaintiff argues that DOE has violated this section because its written criteria do not specifically address the storage of unenriched uranium and a portion of the contract fee is not specifically attributed to storage costs. However, DOE implementing regulations state, "A contract may contain terms and conditions not specified in these criteria, so long as the terms and conditions are not inconsistent with these criteria." 10 C.F.F. § 762.14. We find that provision of storage services is not inconsistent with any other criteria.

The statute's provision that any prices established shall be designed to recover costs does not require DOE to charge on an itemized basis for every cost incurred. The legislative history of the Act indicates that cost recovery is to be flexible. S. Rep. No. 1325, 88th Cong., 2nd Sess. (1964), *reprinted in* 1964 U.S. Code Cong. & Admin. News 3105, 3122. Regulation 762.4 provides that DOE may negotiate prices on a case-by-case basis "in accordance with an overall approach intended to maintain the long-term competitive position of DOE while obtaining the recovery of the Government's costs over a reasonable period of time." 10 C.F.R. § 762.4. Regulation 762.7 provides that DOE shall set prices on the basis of its "judgment of cost differentials associated with supplying enrichment services to different customers." 10 C.F.R. § 762.7. Contrary to Nuclear Transport's allegations, the

statute and regulations accord DOE flexibility in negotiating enrichment contracts rather than requiring a strict cost-per-item basis.

Finally, we reject plaintiff's assertion that the government's change in established policy has unlawfully deprived it of its property interest in its license.[6] Even if the government has changed its regulatory policy to plaintiff's commercial detriment, plaintiff has alleged no more than an indirect injury resulting from government action which does not create entitlement to a hearing. *O'Bannon v. Town Court Nursing Center*, 447 U.S. 773, 789 (1980) ("due process provision of the Fifth Amendment does not apply to the indirect adverse effects of governmental action"). Nuclear Transport's license provided it at most with a "mere unilateral expectation" that the government would not provide storage space, which "is not a property interest entitled to protection." *Calvert Inv., Inc. v. Louisville and Jefferson County Metro. Sewer Dist.*, 847 F.2d 304, 307 (6th Cir. 1988) (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)). *See also Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981) (a constitutional entitlement cannot be created by estoppel); *NL Indus., Inc. v. United States*, 12 Cl. Ct. at 394-400 (no claim for unconstitutional taking when government imposed moratorium on construction of nuclear processing plants even though government's action allegedly totally destroyed value of plaintiff's business, plaintiff alleged that government's action was

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[6] Nuclear Transport submitted an affidavit in which former DOE officials stated that established DOE policy requires that DOE not compete with commercial storage facilities.

unforeseeable, and government had allegedly induced plaintiff to enter business and invest approximately $15 million). Otherwise, the government could never change prior policy without granting a predetermination hearing to those adversely affected.

We find that nothing in the statute, regulations, or DOE policy provides plaintiff with a constitutionally protected right to provide storage services under its license free of government competition or entitles plaintiff to a predetermination hearing when there is a change of policy. For these reasons, we hold that plaintiff fails to state a claim that it has been deprived of the property value of its license without due process of law.

V.

Finally this court must determine whether the district court erred in dismissing Nuclear Transport's *Bivens* claim against the individual defendants for lack of specificity.

The government argues that Nuclear Transport has failed to make any factual allegations that connect any of the individual defendants to the alleged illegal actions. It relies on *Chapman v. City of Detroit*, 808 F.2d 459, 465 (6th Cir. 1986) in which this court stated that a complaint for damages against government officials must contain more than "mere conclusory allegations of unconstitutional conduct by persons acting under color of state law."

Nuclear Transport argues that *Chapman* concerned a 1983 claim rather than a *Bivens* action and that under *Bivens* once one has pleaded with sufficient particularity

what unlawful acts have occurred, it is often impossible to determine prior to discovery the name of the person who committed the unlawful act or how it was accomplished.

We find that the rationale of this court in *Chapman* is applicable to a *Bivens* as well as a 1983 claim. In *Chapman* this court stated:

> There is a sound reason for requiring that a civil rights action against a government official or employee state a claim in terms of facts rather than conclusions. When a government employee is sued, if no factual allegations are made, discovery and perhaps even trial may be required to demonstrate that the claim has no merit. Such activities require the government defendant and others such as government attorneys involved in defense of the claim to divert their attention from their usual activities and to become involved in the litigation to the neglect of their assigned duties.

808 F.2d at 465. If a mere assertion that a former cabinet officer and two other officials "acted to implement, approve, carry out, and otherwise facilitate"[7] alleged unlawful policies were sufficient to state a claim, any suit against a federal agency could be turned into a *Bivens* action by adding a claim for damages against the agency head and could needlessly subject him to the burdens of discovery and trial.

Moreover, under the doctrine of qualified immunity, government officials are shielded from liability for civil

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[7] This was the statement made in plaintiff's complaint.

damages insofar as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Because of the need to protect government officials from the effects of unfounded damages actions, the Fifth Circuit in *Elliott v. Perez*, 751 F.2d 1472, 1482 (5th Cir. 1985) held that in these circumstances greater specificity should be required in order to support the contention that a plea of immunity cannot be sustained. We see no reason why the heightened pleading requirement recognized in *Elliott* and *Chapman* should not apply to a *Bivens* action brought against a federal official. Therefore, we affirm the opinion of the district court on this issue.

For the reasons stated above, the district court's granting of the government's motion to dismiss for failure to state a claim and lack of subject matter jurisdiction is affirmed.[8] The district court's denial of plaintiff's motion for a preliminary injunction and declaratory relief is also affirmed.

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[8] On page 2 of the district court's opinion, the court stated, "Since matters outside the pleadings have been considered by the court, the motion to dismiss for failure to state a claim upon which relief can be granted will be treated as a motion for summary judgment. *See* Rule 12(b), Fed. R. Civ. P.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE NORTHERN DIVISION

NUCLEAR TRANSPORT & STORAGE, INC., Plaintiff	)	
v.	)	
UNITED STATES OF AMERICA, ACTING THROUGH ITS DEPARTMENT OF ENERGY; JOHN S. HERRINGTON, SECRETARY OF ENERGY; PHILIP G. SEWELL, DEPUTY ASSISTANT SECRETARY OF ENERGY FOR URANIUM ENRICHMENT; and JOE B. LAGRONE, MANAGER, OAK RIDGE OPERATIONS, DEPARTMENT OF ENERGY, Defendants	)	Civ. 3-88-304

MEMORANDUM OPINION

(Filed Nov. 29, 1988)

This is an action for injunctive relief, declaratory relief and money damages brought pursuant to 28 U.S.C. §§1331 and 1337 alleging violations of plaintiff's due process rights under the Fifth Amendment to the United States Constitution. Plaintiff, alleging that it is the only company in the United States engaged in the business of storing unenriched uranium in the form of uranium hexachloride ("UH"), contends that the defendants deprived it of its property (the license authorizing it to store UH) when the Department of Energy began a surreptitious and illegal program of offering free storage of UH to

plaintiff's potential customers. Plaintiff brings this action against the United States; John S. Herrington, the Secretary of Energy; Philip G. Sewell, the Deputy Assistant Secretary of Energy for Uranium Enrichment; and Joe B. Lagrone, the Manager, Oak Ridge Operations, of the Department of Energy. Plaintiff brings its action against the three individual defendants in both their official and individual capacities.

The following motions are currently pending:

> (1) The defendants' motion to dismiss for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted, Rules 12(b)(1), (6), Federal Rules of Civil Procedure [Court File #14] (Since matters outside the pleadings have been submitted by the parties and considered by the court, the motion to dismiss for failure to state a claim upon which relief can be granted will be treated as a motion for summary judgment. *See* Rule 12(b), Fed.R.Civ.P.); and
>
> (2) The plaintiff's motion for preliminary injunction [Court File #17].

I.

The Contentions of the Parties

Plaintiff's complaint alleges that it is engaged in the business of providing storage facilities for uranium hexachloride, an unenriched form of uranium needed as nuclear fuel for use in nuclear plants. Plaintiff contends that it is the only private entity in the United States currently engaged in this business. Plaintiff contends that pursuant to and in reliance upon, *inter alia*, the Department of Energy's policy, practice and rule that the storage

of UH was to be done by private industry and that the Department of Energy would not store UH in competition with private industry, plaintiff acquired and developed the facilities, secured the necessary license, and began its business of storing UH for its customers. Those customers are nuclear facilities which use nuclear fuel for which the Department of Energy provides enrichment services.

Plaintiff contends that in the past it has been the policy of the Government to encourage private undertakings, investment and supply of services in all aspects of the nuclear industry except the enrichment step which has thus far remained a Government monopoly. Plaintiff contends that this policy of encouraging private sources of supply is established in DOE regulations and is consistent with the overall Government policy of encouraging private efforts in the nuclear industry. Plaintiff contends that DOE officials and employees encouraged plaintiff to become and remain a supplier of UH storage services for American and foreign entities, and that in accordance with its policy and rule of not competing with private industry, DOE would not engage itself in the storage of UH.

Plaintiff contends that at least since 1984 the Department of Energy has been secretly entering into contracts with both American and foreign entities for enrichment services which include as a general feature the provision of free storage of UH; that this has been accomplished under the subterfuge of separate "feed usage agreements"[1]; that the defendants' actions in providing this

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[1] Plaintiff describes these feed usage agreements as follows:

(Continued on following page)

free storage has caused plaintiff's business to greatly diminish and has largely eliminated the demand for storage of unenriched UH by plaintiff; and that as a result it has suffered over $5,000,000.00 in damages.

Plaintiff's complaint is divided into four counts. Count 1 alleges that DOE's provision of free storage of UH and the actions of the individual defendants in implementing, approving and carrying out the DOE policy of providing such services violates 42 U.S.C. §2201(m) since the provision of these free services "is discouraging and destoying the utilization and development of sources of supply independent of DOE".[2]

(Continued from previous page)

> Under the feed usage agreements being employed by DOE, uranium hexafluoride is delivered by enrichment customer to DOE's enrichment facility, and the customer's account is credited with the appropriate amount of uranium hexafluoride so delivered. At that point, DOE facially takes title to the uranium hexafluoride. Subsequently, uranium hexafluoride is enriched and delivered to the enrichment customer with appropriate deductions made in its account for uranium hexafluoride which is enriched and delivered to the customer. In essence, these feed usage agreements provide free storage to the DOE enrichment contract customer prior to the performance by DOE of the costly enrichment step needed to create usable nuclear fuel.

Affidavit of Bert Jody, Jr., at p.5.

[2] 42 U.S.C. §2201(m) authorizes the Atomic Energy Commission to do the following:

(Continued on following page)

Count 2 of the complaint alleges that DOE's action of effectively changing the terms on which it provides uranium enrichment services to American and foreign

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Agreements Regarding Production.

(m) Enter into agreements with persons licensed under §2133, §2134, §2073(a)(4), or §2093(a)(4) of this title for such periods of time as the Commission may deem necessary or desirable (1) to provide for the processing, fabricating, separating, or refining in facilities owned by the Commission of source, by-product, or other material or special nuclear material owned by or made available to such licensee and which is utilized or produced in the conduct of the licensed activity, and (2) to sell, lease, or otherwise make available to such licensees such quantities of source or by-product material, or other material not defined as special nuclear material pursuant to this chapter, as may be necessary for the conduct of the licensed activity: *provided, however,* That any such agreement may be cancelled by the licensee at any time upon payment of such reasonable cancellation charges as may be agreed upon by the licensee and the Commission: *And provided further,* That the Commission shall establish prices to be paid by licensees for material or services to be furnished by the Commission pursuant to this subsection, which prices shall be established on such a non-discriminatory basis as, in the opinion of the Commission, will provide reasonable compensation to the Government for such material or services and will not discourage the development of services or supply independent of the Commission;

entities to include free storage of UH is contrary to requirements of 42 U.S.C. §2201(b)[3] and 10 C.F.R. Pt. 762.[4]

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[3] 42 U.S.C. §2201(b)(B) provides the Atomic Energy Commission the authority to

> (B) Enter into contracts to provide, after December 31, 1968, for the producing or enriching of special nuclear material in facilities owned by the Commission in accordance within the period of an agreement for cooperation arranged pursuant to Section 2153 of this Title while comparable services are made available pursuant to Paragraph (A) of this sub-section: *Provided*, That (i) prices for services under Paragraph (A) of this sub-section shall be established on a non-discriminatory basis; (ii) prices for services under Paragraph (B) of this subsection shall be no less than prices under Paragraph (A) of this sub-section; and (iii) any prices established under this sub-section shall be on a basis of recovery of the Government's costs over a reasonable time: *And provided further*, That the Commission, to the extent necessary to assure the maintenance of a viable domestic uranium industry, shall not offer such services for source or special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States. The Commission shall establish criteria in writing setting forth the terms and conditions under which services provided under this subsection shall be made available including the extent to which such services will be made available for source or special nuclear material of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States: *Provided*, That before the Commission establishes such criteria, the proposed criteria shall be submitted to the Joint Committee, and for a period of forty-five days shall elapse while

(Continued on following page)

Count III of the complaint alleges that DOE's action in changing the terms on which it provided enrichment services to include free storage of UH were taken without observance of the statutory procedures required by law, including those required under 42 U.S.C. §2201(b) and 5 U.S.C. §§552 and 554 of the Administrative Procedure Act.

Count IV of the complaint alleges that the defendants' conduct of changing its policy with regard to storage of UH without notice to the plaintiff and an opportunity on plaintiff's part to be heard unconstitutionally "interferred with and deprived plaintiff of the benefits of its valuable property and unlawfully and wrongfully expropriated plaintiff's property." In its prayer for relief, plaintiff seeks a temporary and permanent injunction requiring DOE to cease providing free storage of UH; a judicial declaration that DOE's policy is unlawful because it is contrary to 42 U.S.C. §§2011, 2001(m) and (b), and the policies and rules established under those statutory provisions; a judicial declaration that DOE's policy is unlawful because it was established

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> Congress is in session (in computing the forty-five days there shall be excluded the days in which either House is not in session because of adjournment for more than three days) unless the Joint Committee by resolution in writing waives the conditions of, or all or any portion of, such forty-five-day period.

[4] 10 C.F.R. Pt 762 sets forth general terms and conditions established by the Department of Energy for the provision to civilian customers of uranium enrichment services by DOE.

as a general feature of DOE's contracts for enrichment services without observance of the statutorily required procedures for changing such criteria; and for damages in an amount exceeding $5,000,000.00.

In spite of the above characterization of its claims, plaintiff restates its claims in its brief in response to the motion to dismiss as follows:

> Plaintiff's complaint states two basic claims for relief, both of which are grounded in the Fifth Amendment. The first is a claim for declaratory and injunctive relief based on Defendants' violations of statute, DOE regulations, and DOE established practice amounting to a rule, as well as Defendants' violation of statutory procedural requirements, which have deprived Plaintiff of property rights without due process. The second is a damage claim for the commission by Defendants of a constitutional tort in violation of Plaintiff's Fifth Amendment rights. This type of claim is generally denominated a *"Bivens* action." *See Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971).

Plaintiff's brief in opposition to defendants' motion to dismiss [Court File #19] at p.4. This recharacterization of plaintiff's claims appears to the court to arise from a concession by plaintiff that the statutory provisions raised do not, either expressly or implicitly, create a private right of action for the benefit of plaintiff. *See Middlesex County Sewage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981). Accordingly, this court will restrict its inquiry regarding the substantive merits of

plaintiff's claims to the allegations that defendant's conduct deprived it of its property without due process of law in violation of the Fifth Amendment.

The defendants raise the following defenses in their motion to dismiss:

> 1. That sovereign immunity bars any of plaintiff's claims against the United States and the individual defendants in their official capacities;
>
> 2. That the plaintiff lacks standing to litigate its claims;
>
> 3. That the plaintiff fails to state a statutory claim against any of the defendants since (a) no express or implied private right of action exists under the Atomic Energy Act; and (b) nothing in the statutory provisions raised by plaintiff bars DOE from offering free storage of UH to its enrichment customers;
>
> 4. That since the storage of UH was developed to service an industry subject to a pervasive regulatory scheme, any loss of business suffered as a result of defendants' alleged secret storage policy cannot support a Fifth Amendment claim. (*See N L Industries, Inc. v. United States*, 12 Cl.Ct. 391 (1987), *aff'd*, 839 F.2d 1582 (Fed.Cir. 1988)); and
>
> 5. That plaintiff's Fifth Amendment claim should be dismissed since it fails to contain sufficient particularity and factual detail to satisfy the requirements of *Chapman v. City of Detroit*, 808 F.2d 456 (6th Cir. 1986).

II.

Sovereign Immunity

Initially, defendants contend that plaintiff's claims against the United States and the individual defendants in their official capacities are barred by the doctrine of sovereign immunity. A claim against the United States for money damages is barred absent a waiver of sovereign immunity. *United States v. Testan*, 424 U.S. 392 (1976). Such a waiver cannot be implied but must be expressed unequivocally. *Id.* at 399.

Plaintiff contends that the United States has waived its sovereign immunity with respect to a *Bivens* action. Although *Bivens* authorizes actions for money damages against government officials alleged to have infringed upon constitutional rights, *Bivens* does not indicate that the United States has waived its sovereign immunity with respect to *Bivens* actions brought in federal district courts. *See Holloman v. Watt*, 708 F.2d 1399, 1402 (9th Cir. 1983); *Boda v. United States*, 698 F.2d 1174 (11th Cir. 1983); *Adelona v. Webster*, 654 F.Supp. 968 (S.D. N.Y. 1987); *Mid-South Music Corporation v. U. S. Department of the Treasury*, 579 F.Supp. 481 (M.D. Tenn. 1983).[5] The court finds that the plaintiff has failed to demonstrate a waiver of sovereign immunity with respect to its claim for money damages

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[5] While the United States has waived its sovereign immunity for certain common law torts under the Federal Tort Claims Act (28 U.S.C. §§1346 and 2671, *et seq.*) and certain other claims for monetary damages in the Court of Claims under the Tucker Act, *see* 28 U.S.C. §1346, plaintiff must comply with the express provisions of those acts in order to establish immunity and has not done so in this case.

and that claim against the United States is therefore dismissed. *See Bivens v. Six Unnamed Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 410 (1971) (J. Harlan concurring). In addition, the damage claims against the individual defendants in their official capacities are barred by the doctrine of sovereign immunity since any money judgment against them would expend itself on the Federal Treasury.

With respect to plaintiff's claims for injunctive or declaratory relief, plaintiff relies on the waiver of sovereign immunity found in 5 U.S.C. §702. Section 702 provides, *inter alia*, as follows:

> *Right of Review.* A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking review other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a Defendant in any such action, and a judgment or decree may be entered against the United States . . .

The defendants contend that waiver of sovereign immunity in the APA only applies where there exists "no other adequate remedy in a court." *See* 5 U.S.C. §704. The Tucker Act provides that the Court of Claims has jurisdiction to render judgment upon any claim against the United States founded upon either the Constitution, or

any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, . . . " 28 U.S.C. §1346(a)(2). The Court is in agreement with defendants that, if plaintiff can state a constitutional claim, it has an adequate remedy in the Claims Court and that the APA's waiver of sovereign immunity therefore does not extend to plaintiff's claims for declaratory and injunctive relief against the United States or the individual defendants in their official capacities. *See American Science & Engineering Company v. Califano*, 571 F.2d 58 (1st Cir. 1978).

Since plaintiff has failed to demonstrate a waiver of sovereign immunity by the United States with respect to its claims for injunctive or declaratory relief against the United States, those claims must also be dismissed. However, sovereign immunity does not bar the claims for injunctive or declaratory relief with respect to the individual defendants in their personal capacity for acts allegedly committed in excess or outside of their statutory authority. Those acts, of course, cannot be considered the acts of the sovereign. *See Larson v. Domestic and Foreign Commerce Corporation*, 337 U.S. 682, 690-92 (1949).

In light of the foregoing, the court concludes that all of the claims of the plaintiff against the United States and the individual defendants in their official capacities, whether for money damages, injunctive relief or declaratory relief, are barred by the doctrine of sovereign immunity. The claims against the individual defendants in their individual capacities are not barred by sovereign immunity.

III.

Standing

The defendants contend that plaintiff lacks standing to litigate its claim. Article III of the Constitution of the United States limits judicial power to the resolution of "cases and controversies". One component of the case or controversy requirement is that the litigant must have standing to invoke the power of the court. *See Allen v. Wright*, 468 U.S. 737 (1984). Although the standing doctrine is not capable of precise definition, the Court has described it as follows:

> Like the prudential component, the constitutional component of standing doctine incorporates concepts concededly not susceptible of precise definition. The injury must be, for example, "distinct and palpable," [citation omitted] and not "abstract" or "conjectural" or "hypothetical," [citation omitted]. The injury must be *"fairly"* traceable to the challenged action, and relief from the injury must be *"likely"* to follow from a favorable decision. [citation omitted]. These terms cannot be defined so as to make application of the constitutional standing requirement a mechanical exercise.

Id., at 750.

Upon review of plaintiff's complaint, the court is of the opinion that plaintiff has satisfied the standing requirement in this case. Plaintiff alleges that it has suffered a loss of the value of its license to store UH material and injury to its business. This is a "distinct and palpable" injury. It is not abstract, conjectural or hypothetical. The court finds it is fairly traceable to the alleged actions of the defendants and, assuming that the plaintiff could

state and prove a *Bivens* claim against the individual defendants, relief from the injury would be likely to follow. Therefore, the standing requirement has been met.

IV.

Defendants' Qualified Immunity Defense

Under the doctrine of qualified immunity, government officials are shielded from liability for civil damages insofar as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Because of the need to protect government officials from the effects of unfounded damages actions, some courts have indicated that in damages actions where government officials may rely on a qualified immunity defense the liberal notice pleading requirements of Rule 8, Federal Rules of Civil Procedure, do not apply. *See Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985). With respect to pleading requirements in §1983 claims brought against state officials, the United States Court of Appeals for the Sixth Circuit has observed the following:

> It is not enough for a complaint under §1983 to contain mere conclusory allegations of unconstitutional conduct by persons acting under color of state law. Some factual basis of such claims must be set forth in the pleadings. . . .
>
> There is a sound reason for requiring that a civil rights action against a government official or employee state a claim in terms of facts rather than conclusions. When a government employee is sued, if no factual allegations are made, discovery and perhaps even trial may be required to demonstrate that the claim has no merit. Such

> activities require the government defendant and others such as government attorneys involved in defense of the claim to divert their attention from their usual activities and to become involved in the litigation to the neglect of their assigned duties.
>
> In *Hopson v. Wilson*, 737 F.2d 1, 29-31 (D.C. Cir. 1984), the court discussed some of these considerations stating:
>
> Plaintiffs who fail to allege any specific facts to support a claim of unconstitutional conduct cannot expect to involve government actors in protracted discovery and trial. On receipt of such a complaint, Government defendants might move for dismissal or, alternatively, for summary judgment. Then plaintiffs must produce some factual support for their claim to avert dismissal. *Id.*, at 30. Although *Hopson* concerned claims against federal "actors" under 42 U.S.C. §1985, the court referred to similar requirements imposed by other courts, including this court of appeals, in cases brought pursuant to §1983.

Chapman v. City of Detroit, 808 F.2d 459, 465 (6th Cir. 1986).

The plaintiff argues that its complaint contains sufficient factual specificity to satisfy the test recognized in *Elliott* and that the Sixth Circuit has never adopted or followed the *Elliott* test in cases involving a *Bivens* claim against federal officials. Plaintiff asserts that the Sixth Circuit has only adopted a requirement of heightened specificity in complaints brought under 42 U.S.C. §1983 involving state officials. *See* Plaintiff's Brief in Opposition to Defendants' Motion to Dismiss [Court File #19] at p.22.

The court is of the opinion that the heightened specificity required of § 1983 complaints against state officials

should apply with equal force to *Bivens* complaints against federal officials. Federal officials, like state officials, are entitled to raise the qualified immunity defense and civil rights suits against federal officials, like those against state officials, "require the government defendant and others such as government attorneys involved in the defense of the claim to divert their attention from their usual activities and to become involved in the litigation to the neglect of their assigned duties." *Chapman*, 808 F.2d at 465. I see no reason that the heightened pleading requirement recognized in *Chapman* should not apply to a *Bivens* action brought against a federal official.

Plaintiff's complaint makes only general allegations with respect to the actions of the individual defendants in this case. The factual allegations of the complaint are as follows:

> 18. Nevertheless, since at least 1984, DOE has been secretly entering into contracts with both United States and foreign entities for enrichment services which include as a general feature the provision of free storage of uranium hexafluoride. This has been accomplished under the subterfuge of separate "feed usage agreements."
>
> 19. The individual defendants, Secretary of Energy, Deputy Assistant Secretary of Energy, and DOE Manager of Oak Ridge Operations, have each acted to implement, approve, carry out, and otherwise facilitate DOE secretly entering into contracts with United States and foreign entities for enrichment services which effectively include the provision of free storage of uranium hexafluoride.
>
> 20. DOE's and the individual defendants' actions have caused the storage of unenriched

> uranium hexafluoride by plaintiff to greatly diminish and have largely eliminated the demand for storage of unenriched uranium hexafluoride by plaintiff, to plaintiff's damage.

Plaintiff's Complaint at p.8. There are no factual allegations in the complaint indicating how the individual defendants acted to "implement, approve, carry out or otherwise facilitate" the alleged secret activities. Moreover, the complaint contains no allegation that the defendant officials would be unable to successfully maintain an immunity defense. *See Elliott*, 751 F.2d 1472.

It may be that the individual defendants are entitled to rely on a qualified immunity defense in this case. However, because of the total absence of any specific factual allegations with respect to any of the individual defendants, it is impossible to make that determination. The court notes that the defendants first raised the issue of the lack of specificity in the complaint in their memorandum submitted on June 29, 1988. Plaintiff has either been unable to or has not chosen to submit an amended complaint containing greater specificity. The court finds that the plaintiff's complaint fails to comply with specificity requirements of *Chapman* for stating a constitutional claim against a government official. Accordingly, plaintiff's complaint with respect to the individual defendants will be dismissed with prejudice. *See Chapman*, 808 F.2d at 465.[6]

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[6] The court is of the opinion that plaintiff's reliance on *Ecclesiastical Order of Ism of Am, Inc. v. IRS*, 725 F.2d 398 (6th

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VI.

Plaintiff's Due Process Claim

Even if the complaint satisfied the specificity requirements of *Chapman, see* §V above, the complaint fails to state a claim upon which relief can be granted under the Fifth Amendment. Both of plaintiff's constitutional claims are brought pursuant to the due process clause of the Fifth Amendment.[7] Plaintiff does not allege, although defendants characterize plaintiff's claim as such, that its claims arise under the just compensation clause of the Fifth Amendment.[8]

Plaintiff contends that it has been deprived of its property interest in its license to store UH and its property interest in its business. Plaintiff contends that defendants destroyed the value of its license and its business

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Cir. 1984) is misplaced. *Ism* appears to address only the question of whether a *Bivens* action should be dismissed for vagueness simply because it is brought against unnamed federal officials. The *Bivens* case itself was brought against unnamed federal officers and such pleadings are obviously appropriate under some circumstances. *Ism* does not address the question present in this case and in *Chapman* – whether a civil rights action against a government official may rest solely on conclusory allegations of wrongdoing.

[7] In relevant part, the Fifth Amendment provides as follows: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . "

[8] If plaintiff's claim were a just compensation claim, the proper defendant would be the United States and the proper forum would be the Court of Claims. *See, e.g., N L Industries, Inc. v. United States,* 12 Cl.Ct. 391 (1987).

when they disregarded the provisions of the Atomic Energy Act, the Administrative Procedures Act, DOE's own regulations, and DOE's long-standing practice concerning government storage of nuclear feed material. Apparently, it is plaintiff's position that it was denied the process that was due when defendants failed to give it any notice or any opportunity for a hearing before the change in DOE's policy took place. Further, plaintiff contends that defendants failed to comply with the procedural requirement of the Administrative Procedure Act, specifically 5 U.S.C. §§552 and 554, and the procedural requirements of 42 U.S.C. §2201(v).

To sustain a claim for the deprivation of property without due process, the plaintiff must demonstrate the following. First, plaintiff must demonstrate the requisite property interest. Such property interests have been defined as follows:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The source of the plaintiff's claim of entitlement must be that the acts of the sovereign, state or federal, manifested in legislation, rules, of customs.

Moore v. Johnson, 582 F.2d 1228, 1233 (9th Cir. 1978).

Second, plaintiff must demonstrate that the defendant "deprived" it of its property.

Third, plaintiff must demonstrate that this deprivation occurred without due process of law. Once a plaintiff

has established a legitimate entitlement to a particular benefit, the process which is due depends upon a number of factors and "calls for such procedural protections as the situation demands." *Matthews v. Eldridge*, 424 U.S. 334-35 (1975). Obviously a governmental agency must at a minimum comply with any statutory or regulatory procedures which apply to the governmental action in question.

At the outset, it is important to note that plaintiff does not allege that the Government has revoked its license to store nuclear material and plaintiff is still, in fact exercising its license. Rather, plaintiff alleges that as a result of defendants' change from a policy of non-competition to a policy of providing free storage of UH to its customers, it has lost approximately 75% of its business and the value of its license is similarly diminished. *See* Affidavit of Burt Jody, Jr. at p.4. Thus, plaintiff alleges an indirect, as opposed to a direct, injury.

With respect to plaintiff's due process claim, the primary issue presented is whether the plaintiff had such an interest in the continuance of the Government's non-competition policy that, as a matter of constitutional law, it is entitled to a hearing before the Government may change that policy. The plaintiff has identified several potential sources of that right: (1) certain statutory provisions of the Atomic Energy Act of 1954, 42 U.S.C. §§2011, 2201(m), and 2201(v), and the Administrative Procedures Act, 5 U.S.C. §§552 and 554; (2) certain regulatory provisions promulgated by the Commission, 10 C.F.R. Pt. 762; and (3) the alleged long-standing non-competition policy of the Department of Energy. The court respectfully disagrees with the plaintiff over the effect of the above provisions and policies.

Plaintiff argues that defendants conduct is contrary to 42 U.S.C. §2011, which sets out a "congressional declaration or policy" with regard to the use of atomic energy. Section 2011 provides, *inter alia*, as follows:

> Atomic energy is capable of application for peaceful as well as military purposes. It is therefore declared to be the policy of the United States that –
>
> . . .
>
> (b) The development, use and control of atomic energy shall be directed so as to promote world peace, improve the general welfare, increase the standard of living, and strengthen free competition in private enterprise.

42 U.S.C. §2011. This statement of Congress' general policy in passing the Act does not confer any specific rights on plaintiff or anyone else engaged in the atomic energy field. Obviously, §2011 does not confer upon any entity engaged in that field a right to a hearing whenever the Government acts in a way which adversely affects its business. For purposes of this case, §2011 appears to do no more than recognize the general congressional policy of strengthening free competition in private enterprise. This section alone places no restrictions on DOE's discretion in how to carry out that policy.

42 U.S.C. §2201(m) permits DOE to enter into contracts with authorized licensees to "provide for the processing, fabricating, separating, or refining of source, by-product or other material" owned by such licensees and to "sell, lease, or otherwise make available to such licensees source or by-product material". Section 2201(m)

further directs DOE to insure that when entering into these contracts the Commission shall establish prices "on such a non-discriminatory basis as, in the opinion of the Commission, would provide reasonable compensation to the Government for such material or services and will not discourage the development of sources of supply independent of the Commission." Plaintiff contends that the defendants have violated the terms of §2201(m) by competing with it in the supplying of storage services for unenriched uranium. However, the court finds nothing in §2201(m) which confers any right on the plaintiff in this case.

First, this section specifically refers only to the development of sources of supply. Plaintiff does not contend that it is a supplier of unenriched uranium or other materials. Furthermore, the specific language of this section affords the Commission substantial discretion in setting prices to be paid by licensees: "Prices shall be established on such non-discriminatory basis as, *in the opinion of the Commission*, will provide reasonable compensation to the Government . . . ". Accordingly, nothing in §2201(m) accords an affected third party a right to participate in the establishment of DOE's pricing policy.

Plaintiff further relies on 42 U.S.C. §2201(v), which authorizes DOE to enter into contracts with licensees for the enrichment of uranium. Section 2201(v)(B) requires DOE to establish written criteria setting forth the terms under which it will provide those enrichment services. DOE has established those criteria in 10 C.F.R. Pt. 762. Plaintiff does not allege that the criteria established in Part 762 were not presented to Congress as required in §2201(v). Rather, it is plaintiff's contention that §2201(v)

requires DOE to establish regulations regarding the "storage" aspect of the contract, and if it changes its regulation regarding that aspect it must submit that change for approval to Congress first. The court disagrees with plaintiff's interpretation of this section.

The DOE established the criteria set out in 10 C.F.R. Pt. 762 pursuant to §2201 and plaintiff does not contend that those criteria were not presented to Congress properly. The criteria submitted authorize DOE to negotiate prices on a case-by-case basis "in accordance with an overall approach intended to maintain the long-term competitive position of DOE while obtaining the recovery of Government's costs over a reasonable period of time." 10 C.F.R. §762.4.

Furthermore, the regulations allow DOE to use its judgment "of price differentials associated with supplying enrichment services to different customers." 10 C.F.R. §762.7. Although nothing in the regulations mention the supply of storage services, §762.14 provides that a contract "may contain terms and conditions not specified in these criteria, so long as the terms and conditions are not inconsistent with these criteria." Plaintiff has not pointed out anything in §762 that is inconsistent with the provision by DOE of storage services for its customers as part of one of its contracts. I am of the opinion that §762.14 demonstrates that DOE may add additional terms to its enrichment contracts, without returning to Congress for approval, at least so long as the additional terms are not inconsistent with the other provisions of §762. Therefore, I am of the opinion that DOE was not required to submit new proposed criteria regarding the storage of unenriched uranium to Congress prior to including such

provisions in its contracts with its customers. Nor does the Act or regulations promulgated thereunder require DOE to seek approval of any private person or entity prior to altering the conditions of their contracts. I find nothing in § 2201(v) or in 10 C.F.R. Pt. 762 which might confer upon plaintiff any due process rights. In addition, since §762.14 permits the addition of other unspecified terms and conditions, the provision by DOE in its contracts of storage services does not constitute a change in DOE's rules or regulations.

Since the inclusion of the storage provision in the enrichment contracts does not constitute a change in any rule or regulation of DOE, nothing in the APA provision raised by plaintiff, 5 U.S.C. §552 or §554, confers any rights upon plaintiff for either information or a hearing prior to the Government's change in policy.

Finally, plaintiff argues that it relied on DOE's long-standing policy of non-competition. For the purposes of this motion, the court assumes that that has in fact been the policy of DOE. Nevertheless, plaintiff has not demonstrated that it had more than a "unilateral expectation" of the continuation of that policy. A constitutional entitlement cannot be created by "estoppel". *See Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981). Otherwise, the Government could never change prior policy without granting a pretermination hearing to those adversely affected. Accordingly, the court concludes that plaintiff does not have a property interest in continued maintenance by the Government of the policy of "non-competition" such that it would be entitled to a hearing before that policy could be changed.

The Court notes that plaintiff does not define its property interest in this case as a right to continued maintenance of the Government's non-competition policy, but instead describes its property interest as its interest in its license to store UH and its interest in its business. Plaintiff claims that these are the interests that were damaged by defendants' actions. In due process cases, the United States Supreme Court has noted an important distinction between direct and indirect government action:

> Over a century ago, this Court recognized the principle that the due process provision of the Fifth Amendment does not apply to the indirect adverse effects of governmental action. Thus, in the *Legal Tender Cases*, 12 Wall. 457, 551, the Court stated:
>
> > "That provision has always been understood as referring only to direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing upon, or to inhibit laws that indirectly work harm and loss to individuals."

O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 789 (1980).

In the instant case, the plaintiff alleges essentially an indirect injury as the result of a change in governmental regulatory policy. Such an allegation does not state a claim under the Fifth Amendment's taking clause, *see N L Industries, Inc. v. United States*, 12 Cl.Ct. 391 (1987), nor its due process clause.[9] Plaintiff has no "property interest"

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[9] The court finds plaintiff's reliance on *Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983), misplaced. In *Reed*,

(Continued on following page)

in the Government's continuance of its former non-competition policy. Although plaintiff may have a property interest in its license and business, those rights are only indirectly affected by the Government's actions. I am of the opinion that such indirect impact does not entitle plaintiff to a hearing prior to a change in the Government's policy. *See O'Bannon*, 447 U.S. 773. Thus, plaintiff has failed to state a due process claim under the Fifth Amendment.

VII.

Conclusion

Based on the foregoing, the motion to dismiss of the United States of America and the individual defendants in their official capacities is GRANTED for lack of subject matter jurisdiction. Rule 12(b)(1), Federal Rules of Civil Procedure. The motion of the individual defendants to dismiss for failure to state a claim upon which relief can be granted, Rule 12(b)(6), Federal Rules of Civil Procedure, is GRANTED. Since plaintiff does not state a constitutional claim, its motion for a preliminary injunction [court File #17] is DENIED.

(Continued from previous page)

defendants allegedly engaged in a practice of harassing plaintiffs' customers and employees and baseless prosecutions of the plaintiffs in an effort to destroy the value of plaintiffs' business and force them to give up their liquor license. In the instant case, the Government's action, under plaintiff's own theory, was taken to enhance the Government's own competitive interest, rather than to cause injury to the plaintiff or to take away its license or property interest.

Order accordingly.

/s/ James H. Jarvis
James H. Jarvis,
UNITED STATES DISTRICT
JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

NUCLEAR TRANSPORT & STORAGE, INC.,	)	
Plaintiff	)	
v.	)	Civ. 3-88-304
UNITED STATES OF AMERICA, ACTING THROUGH ITS DEPARTMENT OF ENERGY; JOHN S. HERRINGTON, SECRETARY OF ENERGY; PHILIP G. SEWELL, DEPUTY ASSISTANT SECRETARY OF ENERGY FOR URANIUM ENRICHMENT; and JOE B. LAGRONE, MANAGER, OAK RIDGE OPERATIONS, DEPARTMENT OF ENERGY,	)	
Defendants	)	

ORDER

(Filed Nov. 29, 1988)

For the reasons set forth in the Memorandum Opinion this day passed to the Clerk for filing, it is hereby ORDERED that the motion to dismiss of the United States of America and the individual defendants in their official capacities is GRANTED for lack of subject matter jurisdiction. Rule 12(b)(1), Federal Rules of Civil Procedure. The motion of the individual defendants to dismiss for failure to state a claim upon which relief can be granted, Rule 12(b)(6), Federal Rules of Civil Procedure, is GRANTED.

Plaintiff's motion for a preliminary injunction [Court File #17] is DENIED.

ENTER:

/s/ James H. Jarvis
James H. Jarvis
UNITED STATES DISTRICT JUDGE

PART 762 – URANIUM ENRICHMENT SERVICES CRITERIA

Sec.
762.1 General.
762.2 Definitions.
762.3 Enrichment of uranium of foreign origin.
762.4 Prices.
762.5 Costs.
762.6 Recovery of prior unrecouped Government costs.
762.7 Non-discrimination.
762.8 Amendment of contract.
762.9 Termination by DOE.
762.10 Termination by customer.
762.11 Quantities and form of feed and product material.
762.12 Customer's option to acquire tails material.
762.13 Responsibility for material meeting specifications.
762.14 Other terms.
762.15 Prior contracts.

AUTHORITY: Sec. 161(v) of the Atomic Energy Act of 1954, 68 Stat. 921 (42 U.S.C. 2201(v)).

SOURCE: 51 FR 27144, July 29, 1986, unless otherwise noted.

§ 762.1 General

(a) *Authority.* These criteria set forth the general terms and conditions applicable to the provision to civilian customers of uranium enrichment services in facilities owned by DOE, as authorized by the Atomic Energy Act of 1954, as amended (the Act). Specifically, these criteria are established pursuant to section 161(v) of the Act, which was added by Pub. L. 88-489, the "Private Ownership of Special Nuclear Materials Act."

(b) *Eligible customers.* DOE may enter into contracts for providing enrichment services with licensees and cooperative agreement customers. Enrichment services can be offered to cooperative agreement customers only while comparable services are available to licensees and cannot be offered for prices less than the prices for services to licensees.

(c) *Capacity limitations.* DOE will not enter into contracts in excess of the available capabilities of DOE. Available capability consists of inventories of material available or committed to DOE and the physical capability of existing and authorized enrichment plants, fully powered and operated without limitation as to mode of operation, but as reduced by potential commitments involving forecasts of Government needs.

(d) *Sale limitations.* Except as specifically provided, nothing in this notice shall be deemed to affect the sale or leasing of special nuclear material by DOE or the entering into "barter" arrangements whereby special nuclear material is distributed pursuant to section 54 of the Act and source material is accepted in part payment therefor.

(e) *Committed services.* Contracts for the provision of enrichment services shall specify the extent to which a customer is committed to take services from DOE and the charge, if any, for not taking committed services.

(f) *Duration.* Contracts for the provision of enrichment services shall be long-term, except that DOE may offer short-term contracts if, in its view, such contracts would promote the objectives of the AEA.

(g) *Revision of criteria.* The criteria contained in this notice are subject to change by DOE from time to time; however, any such changes shall be developed in conformance with applicable administrative guidelines and shall be submitted to the Committees of the Senate and House of Representatives which under the rules of the Senate and House have jurisdiction for review in accordance with the Act.

§ 762.2 Definitions.

(a) "Enrichment services" means the separative work necessary to enrich or further enrich uranium in the isotope U-235.

(b) "Cooperative agreement customer" means a person receiving enrichment services pursuant to an agreement for cooperation arranged pursuant to section 123 of the AEA.

(c) "Licensee" means a person licensed under sections 53, 63, 103 or 104 of the AEA.

(d) "Separative work" means the measure of the effort required to separate a quantity of uranium feed material into (1) an enriched fraction containing a higher concentration of U-235 than the feed material and (2) a tails fraction containing a lower concentration of U-235.

§ 762.3 Enrichment of uranium of foreign origin.

DOE may not restrict the enrichment of uranium of foreign origin for domestic use except to the extent it

determines such a restriction is necessary to assure the maintenance of a viable domestic uranium industry.

§ 762.4 Prices.

DOE may negotiate prices in individual enrichment services contracts in accordance with an overall approach intended to maintain the long-term competitive position of DOE while obtaining the recovery of the Government's costs over a reasonable period of time.

§ 762.5 Costs.

DOE will establish charges for enrichment services on a basis that recovers appropriate Government costs over a reasonable period of time. Such costs will be determined on a basis that includes the costs incurred in providing enrichment services as follows:

(a) Electric power and all other costs, direct and indirect, of operating the enrichment plants;

(b) Depreciation of enrichment plants;

(c) Costs of process development;

(d) Cost of DOE administration and other Government functions in support of the Enrichment Program; and

(e) Imputed interest on investment in plant, working capital, the natural uranium contained in those inventories at the DOE enrichment plants needed to provide enrichment services, and the separative work costs of pre-produced inventories.

§ 762.6 Recovery of prior unrecouped Government costs.

In establishing prices for providing enrichment services for civilian customers, DOE will establish reserves sufficient to return to the Treasury of the United States, over a reasonable period of time, previously unrecouped and unrecovered costs associated with provision of enrichment services to civilian customers. The estimate of such costs will include costs attributable to plant capacity used to provide enrichment services for civilian customers, but will not necessarily include costs attributable to plant capacity or other investments not properly allocable to the Government's costs associated with providing enrichment services to civilian customers. DOE shall determine the amount to be returned to the U.S. Treasury each year. In determining this amount, DOE shall consider all relevant factors, including the following:

(a) Long-term financial integrity of the enrichment program;

(b) Reliability of service at competitive prices;

(c) Market share;

(d) Impact upon existing enrichment facilities and other program expenditures;

(e) Impact upon research and development; and

(f) Need to reduce the deficit.

§ 762.7 Non-discrimination.

The same prices, as well as other terms and conditions, shall be available to all similarly-situated customers on a non-discriminatory basis, reflecting DOE's

judgment of cost differentials associated with supplying enrichment services to different customers.

§ 762.8 Amendment of contract.

At the request of either DOE or the customer, the parties will negotiate and, to the extent mutually agreed, amend the contract without additional consideration. A contract may provide for renegotiation of prices, as well as other terms and conditions, at specified times or upon request by either party.

§ 762.9 Termination by DOE.

(a) The contract may be terminated by DOE without cost to DOE upon reasonable notice at such time as commercial enrichment services are provided by another domestic source: Provided, however, that DOE will upon request by the customer, rescind any notice of termination and will continue to furnish the services specified in the contract if the services of the domestic source are not available to the customer; (1) To the extent provided for in the DOE contract during the remainder of its terms; and (2) on terms and conditions, including charges, which are considered by the DOE to be reasonable and nondiscriminatory.

(b) DOE may terminate the contract without cost to DOE in the event the customer loses its right to possess enriched uranium, or defaults on its contractual obligations, or becomes involved in bankruptcy proceedings where such involvement interferes with the customer's ability to perform its obligations. In such instances, the

customer will be required to pay a termination charge determined as if the customer had terminated the contract.

§ 762.10 Termination by customer.

The contract shall provide the circumstances under which the customer may terminate the contract in whole or in part. Reasonable and appropriate charges for termination as are negotiated shall be specified in the contract.

§ 762.11 Quantities and form of feed and product material.

The form of feed and product material shall be UF-6, except where DOE and the customer agree to another form. The quantity of material to be furnished by the customer in relationship to the quantity of enriched uranium to be delivered by DOE and the related amount of separative work to be performed by DOE normally will be determined in accordance with the then current standard table of enrichment services published by DOE. DOE may agree to perform such services in accordance with such other table as is within its capability. DOE will not necessarily use the specific feed material or quantity of material furnished by the customer in producing the enriched uranium delivered to the customer.

§ 762.12 Customer's option to acquire tails material.

The customer shall be granted an option to acquire tails material (depleted uranium) resulting from the

performance of enrichment services. The option as to quantity (kg U) of tails material desired by the customer, within the maximum quantity subject to the option, must be exercised at the time of delivery of the related quantity of feed material the U-235 assay of the tails material delivered to the customer will be within the sole discretion of DOE. The maximum quantity of depleted uranium subject to the option will be equal to the difference between the total uranium supplied by the customer as feed material and the total enriched uranium furnished to the customer, less processing losses as established from time to time by DOE. Delivery of tails material will normally be at the same time as delivery of enriched uranium.

§ 762.13 Responsibility for material meeting specifications.

The customer warrants that all feed material meets specifications and, with stated exceptions, agrees to hold DOE and its representatives harmless from all damages, liabilities, or costs arising out of a breach of the warranty where such damages, liabilities, or costs are incurred prior to final acceptance of the feed material by DOE. However, the customer is not deprived of any rights under indemnification agreements entered into pursuant to section 170 of the Act (Price-Anderson indemnification). DOE's obligation to furnish specification material to the customer terminates upon final acceptance of such material by the customer.

§ 762.14 Other terms.

A contract may contain terms and conditions not specified in these criteria, so long as the terms and conditions are not inconsistent with these criteria.

§ 762.15 Prior contracts.

All contracts under which DOE was providing enrichment services prior to the adoption of these criteria are valid. These prior contracts may be amended to conform to these criteria without penalty, if both parties agree.

CONSTITUTION OF THE UNITED STATES OF AMERICA – 1787

ARTICLE [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

TITLE 5 – GOVERNMENT ORGANIZATION AND EMPLOYEES

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

SUBCHAPTER XIII – GENERAL AUTHORITY OF COMMISSION

§ 2201. General duties of Commission

In the performance of its functions the Commission is authorized to –

* * *

(m) Agreements regarding production

enter into agreements with persons licensed under section 2133, 2134, 2073(a)(4), or 2093(a)(4) of this title for such periods of time as the Commission may deem necessary or desirable (1) to provide for the processing, fabricating, separating, or refining in facilities owned by the Commission of source, by-product, or other material or special nuclear material owned by or made available to such licensees and which is utilized or produced in the conduct of the licensed activity, and (2) to sell, lease, or otherwise make available to such licensees such quantities of source or by-product material, and other material not defined as special nuclear material pursuant to this chapter, as may be necessary for the conduct of the licensed activity: *Provided, however,* That any such agreement may be canceled by the licensee at any time upon payment of such reasonable cancellation charges as may be agreed upon by the licensee and the Commission: *And provided further,* That the Commission shall establish prices to be paid by licensees for material or services to be furnished by the Commission pursuant to this subsection, which prices shall be established on such a nondiscriminatory basis as, in the opinion of the Commission, will provide reasonable compensation to the Government for such material or services and will not

discourage the development of sources of supply independent of the Commission;

* * *

(v) Contracts for production or enrichment of special nuclear material; domestic licensees; other nations; prices; materials of foreign origin; criteria for availability of services under this subsection; Congressional review

(A) enter into contracts with persons licensed under sections 2073, 2093, 2133 or 2134 of this title for such periods of time as the Commission may deem necessary or desirable to provide, after December 31, 1968, for the producing or enriching of special nuclear material in facilities owned by the Commission; and

(B) enter into contracts to provide, after December 31, 1968, for the producing or enriching of special nuclear material in facilities owned by the Commission in accordance with and within the period of an agreement for cooperation arranged pursuant to section 2153 of this title while comparable services are made available pursuant to paragraph (A) of this subsection:

Provided, That (i) prices for services under paragraph (A) of this subsection shall be established on a nondiscriminatory basis; (ii) prices for services under paragraph (B) of this subsection shall be no less than prices under paragraph (A) of this subsection; and (iii) any prices established under this subsection shall be on a basis of recovery of the Government's costs over a reasonable period of time: *And provided further*, That the Commission, to the extent necessary to assure the maintenance of a viable domestic uranium industry, shall not

offer such services for source of special nuclear materials of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States. The Commission shall establish criteria in writing setting forth the terms and conditions under which services provided under this subsection shall be made available including the extent to which such services will be made available for source or special nuclear material of foreign origin intended for use in a utilization facility within or under the jurisdiction of the United States: *Provided*, That before the Commission established such criteria, the proposed criteria shall be submitted to the Joint Committee, and a period of forty-five days shall elapse while Congress is in session (in computing the forty-five days there shall be excluded the days in which either House is not in session because of adjournment for more than three days) unless the Joint Committee by resolution in writing waives the conditions of, or all or any portion of, such forty-five-day period.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

NUCLEAR TRANSPORT & STORAGE, INC.,	)	
Plaintiff,	)	CIVIL NO. 3-88-304
v.	)	
UNITED STATES OF AMERICA, acting through its DEPARTMENT OF ENERGY; JOHN S. HERRINGTON, Secretary of Energy; PHILLIP G. SEWELL, Deputy Assistant Secretary of Energy for Uranium Enrichment; and JOE B. LAGRONE, Manager, Oak Ridge Operations, Department of Energy,	)	
Defendants.	)	

COMPLAINT
(Filed April 26, 1988)

Plaintiff, Nuclear Transport & Storage, Inc., for its complaint against defendants, alleges as follows:

1. Jurisdiction in this action lies in this Court under 28 U.S.C. § 1331 and 28 U.S.C. § 1337. The action also arises under the Fifth Amendment to the Constitution of the United States, and jurisdiction is thus founded on the existence of a Federal question under 28 U.S.C. § 1331. Venue is proper under 28 U.S.C. § 1391(e) because, among other things, one or more of the defendants resides in this judicial district.

2. The plaintiff, Nuclear Transport & Storage, Inc., a Delaware corporation organized under the laws of Delaware and having its principal place of business in Paducah, Kentucky, is the holder of a radioactive material license from the Cabinet For Human Resources of the Commonwealth of Kentucky issued as authorized by Federal law to receive, acquire, own, possess and transfer natural uranium hexaflouride and uranium oxide under contract with United States and foreign entities.

3. The defendants are: (a) the United States of America, acting through its Department of Energy ("DOE"), and executive department and agency of the federal government. DOE provides uranium enrichment services to United States and foreign entities; (b) John S. Herrington, the Secretary of Energy, the head of DOE; (c) Phillip G. Sewell, Deputy Assistant Secretary for Uranium Enrichment; and (d) Joe B. LaGrone, Manager, Oak Ridge Operations for DOE. DOE exercises certain functions formerly vested in the Atomic Energy Commission and its successor agency, the Energy Research and Development Administration. Other such functions are now exercised by the Nuclear Regulatory Commission ("NRC").

4. Uranium is used as fuel for nuclear power plants by electric utilities in the United States and foreign countries. Before naturally occurring uranium can be used in most reactors, it must be enriched. Natural uranium consists of less than one percent U-235, the radioactive isotope. Nuclear fuel suitable for use in nuclear power plants must contain about three percent U-235.

5. After naturally occurring uranium oxide is mined and refined to a product called "yellowcake," it is converted to a gas called uranium hexaflouride. In the United States, these steps in the nuclear fuel cycle are performed by private industry. Uranium hexaflouride as natural uranium, called feed material, can then be "enriched" using different industrial processes to create an end product with the desired higher percentage of the radioactive isotope U-235. This uranium enrichment step is performed by or on behalf of DOE. The industrial enrichment process used by DOE is called gaseous diffusion. DOE owns and contracts for operation of enrichment facilities at Paducah, Kentucky; Oak Ridge, Tennessee; and Portsmouth, Ohio. The only such enrichment facility being operated at the present time is at Paducah, Kentucky.

6. After the enrichment process, the enriched uranium hexaflouride is fabricated in other industrial processes into fuel which is suitable for use in nuclear power plants. This additional processing is performed by private industry.

7. The gaseous diffusion enrichment process is expensive and adds significantly to the investment utilities are required to make to obtain suitable nuclear fuel. For that reason and others, utilities in the United States and foreign countries have a common practice of storing quantities of the feed material as natural uranium in the form of uranium hexaflouride until shortly before nuclear fuel is required for use in nuclear plants and to enrich and fabricate needed uranium fuel from stocks of uranium hexaflouride only when fuel is needed. Utilities and utility fuel suppliers store and are expected to store in the

future quantities of unenriched uranium hexaflouride for periods ranging from less than one year to many years. In recent years, the long delays in the completion and licensing of nuclear plants, the cancellation of nuclear plants under construction, and the interruptions in the operation of existing plants, have greatly increased the need for storage of such feed material.

8. Unenriched uranium hexaflouride is a source material under the provisions of the Atomic Energy Act of 1954, as amended ("the Act"), 42 U.S.C. §§ 2014, 2091, and can only be possessed and stored by an entity with a license from the NRC to do so or a license from an Agreement State which has the authority to issue such licenses pursuant to agreement between such a state and the Nuclear Regulatory Commission under the provisions of section 274 (42 U.S.C. § 2021) of the Act and regulations issued by the NRC. The NRC exercises certain regulatory functions formerly vested in the Atomic Energy Commission and its successor the Energy Research and Development Administration.

9. The plaintiff's business is to serve as a licensed storage facility for unenriched uranium hexaflouride, usually feed material, for United States and foreign entities.

10. Prior to the actions of DOE complained of here, plaintiff acquired and developed the facilities, secured the necessary license, and began the business of storing for a fee unenriched uranium hexaflouride for its customers. This was done pursuant to and in reliance upon, inter alia, DOE's policy, practice and rule that the storage of unenriched uranium hexaflouride was to be done by

private industry, including plaintiff, and that DOE would not store unenriched uranium hexaflouride in competition with private sector storage capability. Plaintiff's reasonable expectation was that its entire storage capacity of 2150 cylinders at a storage price of $40 to $50 per cylinder per month would be in use for many years.

11. Plaintiff is now the only private entity solely in the business in the United States of supplying storage facilities for uranium hexaflouride to utilities and fuel suppliers. It is ideally located within one mile of DOE's only operating uranium enrichment facility at Paducah, Kentucky.

12. Under section 1 of the Act (42 U.S.C. § 2011), it is the policy of the United States to develop and use atomic energy to "strengthen free competition in private enterprise." This policy is further evidenced in other sections of the Act and in the Department of Energy Organization Act including section 103 thereof, which provides in part "to assure to the maximum extent practicable, that the productive capacity of private enterprise shall be utilized in the development and achievement of the policies and purposes of this Act." The effort and effect of the government atomic energy program have been to encourage private undertakings, investment, and supply of services in all aspects of the nuclear industry except the enrichment step which thus far has remained a government monopoly. This policy if encouraging private sources of supply is established in DOE regulations and is consistent with the over all government policy favoring private efforts over government-provided goods and services. See, e.g., OMB Circular A-76.

13. The United States Government policy of encouraging the strengthening of free competition in private enterprise in the nuclear industry is specifically implemented in section 161m of the Act, 42 U.S.C. §2201(m), in which DOE is authorized to provide United States and foreign entities with various materials and services useful in nuclear power production, but DOE is required to establish nondiscriminatory prices for such materials and services in amounts that will provide, in DOE's opinion, reasonable compensation to the Government and which "will not discourage the development of sources of supply independent of the [DOE]."

14. In accordance with the above statutes and the polices and rules of DOE implementing those statutes and established under those statutes, the plaintiff was specifically and individually solicited, encouraged, and urged by officials and employees of DOE to become and remain a supplier of unenriched uranium hexaflouride storage services for United States and foreign entities. The urgings and representations of the DOE officials and employees to plaintiff included the commitment that DOE was encouraging private entities to provide this storage service and that DOE would not be in competition in that business itself. DOE informed plaintiff and others that in accordance with its policy and rule of not competing with private industry, the storage of unenriched uranium hexaflouride was not undertaken by DOE and would not be, but that such services would have to be obtained from private suppliers like plaintiff.

15. Within the government policy, practice and rule to promote private competition in the nuclear industry, DOE is authorized by the Act to enter into contracts for

and to provide enrichment services to utilities from DOE's own gaseous diffusion enrichment facilities. That Act requires that DOE's prices for enrichment services be nondiscriminatory and be established on a basis to recover the Government's cost of enrichment services and facilities over a reasonable period. Section 161v of the Act requires that, "to the extent necessary to assure the maintenance of a viable domestic uranium industry," DOE shall not offer enrichment services for source materials of foreign origin for use in domestic power plants. 42 U.S.C. §2201(v).

16. Section 161v of the Act also requires DOE to establish written criteria setting forth the terms and conditions under which enrichment services are to be provided, and requires that DOE's proposed criteria be submitted to designated committees of Congress for 45 days while Congress is in session before the criteria are finally established. 42 U.S.C. §2201(v). Included among the terms and conditions which the criteria are to establish are DOE's charges for enrichment services, the conditions under which services are offered, and the general features of DOE's standard contracts for enrichment services.

17. On July 29, 1986, DOE established new criteria on the terms and conditions under which enrichment services are provided by it. 51 *Federal Register* 27144 (July 29, 1986); 10 C.F.R. Pt. 762. Neither the new criteria, nor the criteria that were replaced, stated that DOE would provide free storage services and other incentives for unenriched uranium hexaflouride as one of the terms and conditions of its enrichment contracts.

18. Nevertheless, since at least 1984, DOE has been secretly entering into contracts with both United States and foreign entities for enrichment services which include as a general feature the provision of free storage of uranium hexaflouride. This has been accomplished under the subterfuge of separate "feed usage agreements."

19. The individual defendants, Secretary of Energy, Deputy Assistant Secretary of Energy, and DOE Manager of Oak Ridge Operations, have each acted to implement, approve, carry out, and otherwise facilitate DOE secretly entering into contracts with United States and foreign entities for enrichment services which effectively include the provision of free storage of uranium hexaflouride.

20. DOE's and the individual defendants' actions have caused the storage of unenriched uranium hexaflouride by plaintiff to greatly diminish and have largely eliminated the demand for storage of unenriched uranium hexaflouride by plaintiff, to plaintiff's damage.

COUNT I

21. The foregoing Paragraphs 1 through 20 are incorporated herein as fully as if they restated here in full.

22. DOE's provision of free storage of uranium hexaflouride to United States and foreign entities, and the actions of the individual defendants Secretary of Energy, Deputy Assistant Secretary of Energy, and DOE Manager of Oak Ridge Operations in implementing, approving, and carrying out the DOE policy and rule of doing so,

violate 42 U.S.C. §2201(m), in that DOE receives no compensation for those services provided by it; and DOE's provision of this free service is discouraging and destroying the utilization and development of sources of supply independent of DOE to the extent of putting plaintiff, the only remaining private supplier providing solely storage services, out of business, in violation of 42 U.S.C. §2201(m) and the policy and rule of a DOE established under the Act not to store feed materials in competition with the private sector. DOE's provision of such free storage services, as implemented, approved, and carried out by the individual defendants, Secretary of Energy, Deputy Assistant Secretary of Energy, and DOE Manager of Oak Ridge Operations, is in violation of 42 U.S.C. §2201(m) and the policy and rule of DOE established under the Act, and is therefore unlawful.

COUNT II

23. The foregoing Paragraphs 1 through 22 are incorporated herein as fully as if they were here restated in full.

24. DOE's action of effectively changing the terms on which it provides uranium enrichment services to United States and foreign entities to include the provision of free storage for unenriched uranium hexaflouride, through the subterfuge of feed usage agreements, and the actions of individual defendants Secretary of Energy, Deputy Assistant Secretary of Energy, and DOE Manager of Oak Ridge Operations in implementing, approving, and carrying out the DOE policy and rule to do so, are contrary to the requirements of 42 U.S.C. §2201(v) and

DOE's own regulations, 10 CFR Pt. 762, establishing the criteria under which enrichment services are to be provided, and is therefore unlawful.

COUNT III

25. The foregoing Paragraphs 1 through 24 are incorporated herein as fully as if they were here restated in full.

26. DOE's action of changing the terms on which it provides uranium enrichment services to United States and foreign entities to effectively include the provision of free storage for uranium hexaflouride, through the subterfuge of feed usage agreements, and the actions by the individual defendants, Secretary of Energy, Deputy Assistant Secretary of Energy, and DOE Manager of Oak Ridge Operations, in implementing, approving, and carrying out the DOE policy and rule to do so, were taken without observance of the statutory procedure required by law, including 42 U.S.C. §2201(v) and the Administrative Procedure Act and specifically 5 U.S.C. §§552 and 554, for changing the criteria and the terms of DOE's enrichment contracts and are therefore unlawful.

COUNT V

27. The foregoing Paragraphs 1 through 26 are incorporated herein as fully as if they were here restated in full.

28. DOE and the individual defendants Secretary of Energy, Deputy Assistant Secretary of Energy, and DOE Manager of Oak Ridge Operations acted unlawfully and

wrongfully when DOE, by and through the individual defendants, secretly changed DOE policy, rule and criteria, upon which plaintiff relied for its business and which reliance had been induced by DOE's statements (through its authorized officers and employees including the Secretary of Energy, the Deputy Assistant Secretary of Energy, and the DOE Manager of Oak Ridge Operations) to plaintiff of DOE's present policy and rule to use private industry as much as possible in providing nuclear fuel services to utilities, and that change without process, notice to plaintiff of the proceeding and its potential effect on plaintiff's business, and without opportunity on plaintiff's part to be heard on DOE's action to provide free services in direct competition with plaintiff's business established at DOE's urging, unlawfully and unconstitutionally interfered with and deprived plaintiff of the benefits of its valuable property and unlawfully and wrongfully expropriated plaintiff's property.

WHEREFORE, the plaintiff demands judgment against the defendants for:

1. A temporary and permanent injunction requiring DOE to cease providing, and requiring the individual defendants Secretary of Energy, Deputy Assistant Secretary of Energy, and DOE Manager of Oak Ridge Operations to cease acting to cause DOE to provide, free storage for unenriched uranium hexaflouride for United States and foreign entities.

2. A judicial declaration that DOE's secret policy of providing free storage of unenriched uranium hexaflouride, as created and implemented by DOE and the

individual defendants Secretary of Energy, Deputy Assistant Secretary of Energy, and DOE Manager of Oak Ridge Operations, is unlawful because contrary to section 103 of the Department of Energy Organization Act, 42 U.S.C. §§ 2011, and 2201(m) and (v), and DOE's policies and rules implementing those statues and established under those statutes.

4. A judicial declaration that DOE's secret policy, rule and action of providing free storage of unenriched uranium hexaflouride, as created and implemented by DOE and the individual defendants Secretary of Energy, Deputy Assistant Secretary of Energy, and DOE Manager of Oak Ridge Operations, is unlawful because it was effectively established as a general feature of DOE's contracts for enrichment services without observance of the statutorily required procedure to change the criteria.

5. Plaintiff's damages caused by DOE and the individual defendants Secretary of Energy, Deputy Assistant Secretary of Energy, and DOE Manager of Oak Ridge Operations by their unlawful and unconstitutional conduct, in an amount exceeding $5 million.

6. Such other and further relief as is mandated in the interests of justice.

NUCLEAR TRANSPORT &
STORAGE, INC.

By/s/ Charles Wagner
Charles A. Wagner III
WAGNER, MYERS &
SANGER, P.C.
1801 Plaza Tower
Knoxville, TN 37901
Its Attorney

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

NUCLEAR TRANSPORT & STORAGE, INC., Plaintiff, v. UNITED STATES OF AMERICA, acting through its DEPARTMENT OF ENERGY; *et al.*, Defendants.	)	CIVIL NO. 3-88-304

AFFIDAVIT OF BERT JODY, JR.

STATE OF TENNESSEE)
) ss:
COUNTY OF KNOX)

Bert Jody, Jr., being first duly sworn, deposes and says:

I reside in Paducah, Kentucky and am the president of Nuclear Transport & Storage, Inc. ("NT&S"), the Plaintiff in the above-styled proceeding. I have personal knowledge of the matters herein stated.

I have been involved in the hazardous materials business for over thirty years. During almost twenty of those years, I have been actively involved in the transport and storage of nuclear materials. In participating in various activities involving this business, I authored and delivered several papers at sessions of international symposia on the packaging and transport of nuclear materials. Further, for some time I have served as a member of various

standards writing committees of the American National Standards Institute. These standards committees are charged with establishing standards for (1) the use and modification of uranium hexafluoride cylinders, (2) the packaging for transport of nuclear materials (including uranium hexafluoride), (3) the transporting of fissile and radioactive containers and (4) the truck transport of weight concentrated radioactive loads. In addition, another company of which I am principal is responsible for annually transporting more uranium hexafluoride tonnage in the United States than any other carrier of such nuclear materials.

NT&S was formed in 1970, and since 1975 has held a radioactive materials license from the Cabinet for Human Resources of the Commonwealth of Kentucky. This license was issued to NT&S, as authorized by Federal law, to receive, acquire, own, possess and transfer natural uranium hexafluoride and uranium oxide under contract with United States and foreign entities.

Between 1970 and 1975 NT&S engaged in the storage of radioactive materials which were in transit. Commencing in 1975, NT&S became the only private non-converter entity in the United States solely in the business of supplying storage facilities for uranium hexafluoride to utilities and fuel suppliers. Between 1975 and the present, NT&S has had only one other non-converter competitor in the private sector competing for the storage services it provides. This competitor (Edlow International Company) was in existence only between 1980 and 1984.

From personal discussions with government officials and documents I am aware that between the start of

NT&S's storage services in 1975 and approximately 1983 or 1984, it was the Department of Energy's ("DOE") and its predecessors' policy to not compete with private enterprise concerning the provision of storage services for uranium hexafluoride. This long-standing DOE policy has been confirmed to me and others in writing on several occasions. For example, in a letter dated October 25, 1978, which I have previously viewed, then counsel James C. Hall of the Energy Research and Development Administration ("ERDA") stated to Kurt Schreiber of NUKEM Inc. that it was ERDA's policy not to compete with private enterprise in the provision of storage for uranium hexafluoride. Subsequently, in a letter dated July 22, 1980, to D.B. Sinden of the Atomic Energy Control Board of Canada, then DOE Manager of Oak Ridge Operations, R. J. Hart, stated "It has come to our attention that commercial storage facilities for natural [uranium hexafluoride] are now available. Established DOE policy requires that DOE not compete with such commercial facilities." A copy of Mr. Hart's letter (a copy of which was sent to me by Mr. Hart at the time it was sent to Mr. Sinden) is attached hereto as *Exhibit 1*, and is incorporated herein fully by reference.

Similarly, in a letter dated October 9, 1984, then DOE Deputy Secretary Danny J. Boggs stated to me on behalf of DOE: "We have not reversed our long-standing policy to refrain from natural uranium storage in direct competition with private sector storage capability." A copy of Mr. Boggs' October 9, 1984 letter is attached hereto as *Exhibit 2*, and is incorporated herein fully by reference. Mr. Boggs echoed this statement of DOE policy in a similar letter to Jack Edlow of Edlow International Company

dated October 10, 1984. A copy of Mr. Boggs' letter of October 10, 1984 is attached hereto as *Exhibit 3*, and is incorporated herein fully by reference.

This long-standing policy of DOE was again reinforced in a memorandum from DOE's then Deputy Assistant Secretary for Uranium Enrichment, John R. Longnecker, to Defendant Joe B. LaGrone dated October 24, 1984. A copy of Mr. Longnecker's October 24, 1984 memorandum is attached hereto as *Exhibit 4*, and is incorporated herein fully by reference. As may be noted from a review of Mr. Longnecker's memorandum, it was DOE's policy that DOE was not to serve as a depository of a significant portion of the total feed material (uranium hexafluoride) to be delivered to DOE's enrichment plants.

Between 1975 and approximately 1984, NT&S enjoyed a substantial and diverse paying clientele for its storage services. However, beginning in approximately 1984, NT&S noticed a sharp drop in customer demand for its storage services – this in spite of the disappearance of its only private sector competitor (Edlow International Company) and an industry-wide increase in the amount of uranium hexafluoride which public utilities and other users of nuclear fuel were required to store. More specifically, the storage of uranium hexafluoride at NT&S's facility has dropped by approximately seventy-five percent (75%) since 1984. At present, there are several former customers of NT&S which are taking advantage of the free storage of uranium hexafluoride provided by DOE under the guise of feed usage agreements. These former customers include several United States as well as foreign companies. This list of former customers includes: Virginia Electric Power Company, Washington Public Power

Services, General Electric Company, Power Authority of the State of New York (PASNY), Chugoku, Chubu, Taiwan Electric Power Company, Electric Power Company of Korea and Eldorado Resources, Ltd.

Under the feed usage agreements being employed by DOE, uranium hexafluoride is delivered by an enrichment customer to DOE's enrichment facility, and the customer's account is credited with the appropriate amount of uranium hexafluoride so delivered. At that point, DOE facially takes title to the uranium hexafluoride. Subsequently, uranium hexafluoride is enriched and delivered to the enrichment customer with appropriate deductions made in its account for uranium hexafluoride which is enriched and delivered to the customer. In essence, these feed usage agreements provide free storage to the DOE enrichment contract customer prior to the performance by DOE of the costly enrichment step needed to create usable nuclear fuel. The widespread use of feed usage agreements by DOE was confirmed to me in a response to a Freedom of Information Act request sent by me to P. T. Marquess of DOE dated June 24, 1987. A copy of my request and DOE's response letter dated September 24, 1987 are attached hereto as collective *Exhibit 5* and are incorporated herein fully by reference.

/s/ Bert Jody, Jr.
Bert Jody, Jr.

Sworn to and subscribed before me this 28th day of August, 1988.

/s/ Cynthia G. Sharik
Notary Public

My Commission
Expires: 11/26/88

EXHIBIT 1

Department of Energy
Oak Ridge Operations
P.O. Box E
Oak Ridge, Tennessee 37830

July 22, 1980

Atomic Energy Control Board of Canada
ATTN: Mr. D. B. Sinden, Manager
Safeguards and Security Division
Safeguards and Nuclear Materials Branch
P. O. Box 1046
Ottawa, Canada
K1P 5S9

Dear Mr. Sinden:

TRANSFER OF NATURAL URANIUM HEXAFLUORIDE OF CANADIAN ORIGIN FROM DOE STORAGE FACILITIES

Natural uranium hexafluoride (UF_6) of Canadian origin is stored in United States Department of Energy (DOE) storage facilities pursuant to contracts between DOE and two of its enriching services customers. Under the terms of the contracts, DOE agreed to store up to 400,000 kilograms of such feed material for Washington Public Power Supply System (WPPSS), and up to 500,000 kilograms for Portland General Electric (PGE). Currently, DOE is storing 382,742 kilograms of Canadian-origin UF_6 for WPPSS, and 349,662 kilograms for PGE.

It has come to our attention that commercial storage facilities for natural UF_6 are now available. Established DOE policy requires that DOE not compete with such commercial facilities. The contracts between DOE and its

customers acknowledge this policy and contain appropriate termination provisions to further it. However, in accordance with the terms of Notes exchanged between the Government of the United States and the Government of Canada, DOE may not authorize transfer of Canadian-origin UF_6 from DOE facilities without the prior written consent of the Atomic Energy Control Board of Canada.

Pursuant to the interim safeguard arrangements between the Government of the United States and the Government of Canada, established by exchange of United States Embassy Note 59, dated March 18, 1976, and Department of External Affairs of Canada Note 551, dated March 25, 1976, the United States Department of Energy hereby requests the written consent of the Atomic Energy Control Board of Canada to authorize transfer of natural uranium hexafluoride of Canadian origin from DOE storage facilities.

Sincerely,

/s/ James H. Hill, acting
R. J. Hart
Manager

CC-10:MAM

cc: Washington Public Power Supply System
ATTN: Mr. Larry L. Grumme
Technical Division
P. O. Box 968
3000 George Washington Way
Richland, Washington 99352

Portland General Electric Company
ATTN: Mr. L. C. Curtright, Director
Fuel Supply Department

621 Alder Street
Portland, Oregon 97250

bcc: W. P. Snyder, CC-10
J. C. Hall, CC-10
H. D. Fletcher, Director, EOD
H. J. McAlduff, Jr., EOD

Mr. B. Jody, Jr., President
Nuclear Transport & Storage, Inc.
P.O. Box 2471
Paducah, Kentucky 42001

EXHIBIT 2

Department of Energy
Washington, D.C. 20585

October 9, 1984

Mr. Bert Jody, Jr.
President
Nuclear Transport and Storage, Inc.
P.O. Box 2471
Paducah, KY 42001

Dear Mr. Jody:

Thank you for your letter of August 16, 1984, regarding natural uranium storage services.

I believe that your letter may have been prompted as a result of a miscommunication regarding current Departmental policy regarding this matter. We have not reversed our longstanding policy to refrain from natural uranium storage in direct competition with private sector storage capability. We have recently entered into arrangements with domestic converters to level feed deliveries to the enrichment plants. Leveling deliveries of feed material

which involves spreading out deliveries which would otherwise be due on a single date, smooths feed handling operations at the plants and enhances the overall efficiency of feed transactions for both the Department and its customers. In addition, during the course of negotiations with customers converting to the Utility Services contract, feed usage agreements have been considered in a few circumstances to accommodate specialized customer needs. Under a feed usage agreement, the Department does not store customer uranium at no charge, but actually takes title to the material and utilizes it in lieu of Government inventories in operating the enrichment complex. This arrangement benefits all enrichment customers by reducing the imputed interest portion of the separative work price. These arrangements do not represent a new practice. The Department has entered into similar arrangements over a time period of about 5 years beginning in 1975 and many of these arrangements remain in effect today.

These arrangements are being considered only in the context of specific Utility Services contract negotiations when their use is warranted to accommodate unique customer needs. To date, feed usage agreements have been considered in only two instances, and we expect them to be required only in very limited circumstances. Feed usage agreements are not automatically available to all Department enrichment customers.

I believe that this policy is reasonable and does not constitute unfair Government competition with private sector services. I hope that this clarification will satisfy your concern in this matter.

Sincerely,

/s/ Danny J. Boggs
Danny J. Boggs
Deputy Secretary

EXHIBIT 3

Department of Energy
Washington, D.C. 20585

October 10, 1984

Mr. Jack Edlow
President
Edlow International Company
1815 H Street, N.W., Suite 910
Washington, D.C. 20006

Dear Mr. Edlow:

Thank you for your letter of August 9, 1984, regarding storage of natural uranium.

I believe that your letter may have been prompted as a result of a miscommunication regarding current Departmental policy regarding this matter. We have not reversed our longstanding policy to refrain from natural uranium storage in direct competition with private sector storage capability. We have recently entered into arrangements with domestic converters to level feed deliveries to the enrichment plants. Leveling deliveries of feed material smooths feed handling operations at the plants and enhances the overall efficiency of feed transactions for both the Department and its customers. In addition, during the course of negotiations with customers converting to the Utility Services contract, feed usage agreements

have been considered in a few circumstances to accommodate specialized customer needs. Under a feed usage agreement, the Department does not store customer uranium at no charge, but actually takes title to the material and utilizes it in lieu of Government inventories in operating the enrichment complex. This arrangement benefits all enrichment customers by reducing the imputed interest portion of the separative work price.

These arrangements are being considered only in the context of specific Utility Services contract negotiations when their use is warranted to accommodate unique customer needs. To date, feed usage agreements have been considered in only two instances, and we expect them to be required only in very limited circumstances. Feed usage agreements are not automatically available to all Department enrichment customers.

I believe that this policy is reasonable and does not constitute unfair Government competition with private sector services. I hope that this clarification will satisfy your concern in this matter.

Sincerely,

/s/ Danny J. Boggs
Danny J. Boggs
Deputy Secretary

EXHIBIT 4

United States Government Department of Energy

MEMORANDUM

DATE: OCT 24 1984

REPLY TO:
ATTN OF: NE-32

SUBJECT: Feed Material Usage Agreements

TO: Joe B. La Grone, Manager, Oak Ridge Operations Office

During negotiations for the conversion of existing contracts to the new Utility Services (US) contract, customers have expressed an interest in the Department of Energy (DOE) providing usage agreements for the early delivery of feed material in order to resolve particular customer concerns. DOE's ability to provide this ancillary customer service has been considered to be an important feature to several customers in making a decision as to whether to convert to the new US contract. It would also enhance DOE's relations with customers and strengthen DOE's competitive position.

In reviewing this matter, it also appears that the application of usage agreements could facilitate increased production flexibilities, especially for those circumstances in which DOE plans to overfeed in order to reduce its overall power cost. Advice from counsel at Oak Ridge also indicates that there are no legal or legislative constraints to the provision of usage agreements.

In light of the circumstances described above, and in order to promote DOE's competitive position to the maximum extent possible, the following policy is established for the provision of usage agreements with DOE's enrichment customers:

1. Usage agreements may be implemented with enrichment customers for those cases in which it

is determined to be a significant factor in the determination of a customer in converting to the US contract.

2. Usage agreements may be utilized on a short-term basis to assist customers who have emergency needs in terms of feed material deliveries.

3. Material delivered under a usage agreement and accepted by DOE shall be credited to the customer's account for subsequent application under its uranium enrichment services contract or for transfer to the uranium enrichment services agreement of another DOE customer.

4. All feed received and accepted into the usage agreement will become the property of DOE with the customer's account being credited with the appropriate quantity of feed. The use of such feed shall be within the exclusive control of DOE and without charge to DOE.

5. Unless otherwise agreed, all feed material to be furnished to DOE hereunder shall be natural uranium in the form of UF_6 and conform to DOE's established specifications for such material.

6. In general, the application of usage agreements should involve limited quantities of feed material and be offered to customers on a preferential basis. In this respect, DOE should not serve as a depository of a significant portion of the total feed material to be delivered to DOE's enrichment plants. Also, usage agreements should be applied on a priority basis first to customers who

would not otherwise have converted to the US contract but did so because a usage agreement was made available, and secondly to those US contract holders who would increase their market share with DOE because of the usage agreement. Oak Ridge shall establish the terms and conditions for usage agreements as may be necessary to implement the above policy.

The above policy is intended to better service our customers by addressing the needs of the marketplace. In the application of this policy by your staff, please inform this office prior to execution of future usage agreements so that we may ensure that DOE's policy effectively enhances DOE's competitive position.

/s/ John R. Longenecker
Deputy Assistant Secretary
for Uranium Enrichment
Office of Nuclear Energy

EXHIBIT 5 (collective)

Certified Mail

June 24, 1987

Mr. P. T. Marquess
U. S. Dept. of Energy
Office of Assistant Manager for Administration
P. O. Box E
Oak Ridge, TN 37831

Re: Nuclear Transport and
Storage, Inc.,
Paducah, Ky.
Request for Documents
Freedom of Information Act

Dear Mr. Marquess:

As President of Nuclear Transport and Storage, Inc., I hereby request the following information under the U.S. Freedom of Information Act.

1. Copies of all "feed usage agreements" and addendums thereto entered into between the U.S.D.O.E. and all private and public utilities, both foreign and domestic between January 1983 through May 31, 1987.

2. Copies of all inventories to be stated either in kilograms, or number of cylinders on D.O.E. facilities, of natural uranium hexaflouride presently held for storage by U.S.D.O.E. under the above "feed usage agreements" and addendums thereto, for the use and benefit of all private and public, foreign and domestic utilities.

3. Copies of all U.S.D.O.E. correspondence relative to the above feed usage agreements between January 1, 1983 through May 31, 1987.

4. The internal costs sheets developed by U.S.D.O.E. for the cost of the storage of natural uranium hexaflouride for its customers under the fee usage agreements between January 1, 1983 through May 31, 1987 at its Gaseous Diffusion Facilities, or in lieu thereof, the total actual costs incurred by U.S.D.O.E. in the storage of the "48G" and "48H" cylinders, including the costs of the cylinders furnished by U.S.D.O.E. at no expense to the above said customers with the feed.

5. The copies of all U.S.D.O.E. correspondence relative to the "holding accounts and/or leveling feed deliveries in existence between the U.S.D.O.E. and the

domestic or foreign convertors, i.e. Allied Chemical/Signal Corporation, Metropolis, Illinois or Morristown, New Jersey; Sequoia Fuels, Inc., Gore, Oklahoma; and Eldorado Resources, Ltd., Port Hope, Ontario.

6. Information, document or directives issued by U.S.D.O.E. directing the three convertors, Allied Chemical/Signal Corporation, Sequoia Fuels, Inc. and Eldorado Resources, Ltd. relative to shipping natural uranium to specific enrichment facilities. Specifically, those documents that establish delivery points to the above named convertors for the past five years, beginning January 1983.

It is my understanding that this information is readily available at D.O.E. the Oak Ridge Operations, and can be easily obtained.

When these documents are available, please inform me by letter or telephone as to the total costs thereof, and in what manner the D.O.E. desires payment. Please include the mailing cost by certified mail, return receipt requested.

I thank you for your cooperation. If you have any question regarding this request, please call me at our Paducah office 502-444-7982.

Very truly yours,

NUCLEAR TRANSPORT & STORAGE

Bert Jody, Jr.
President

[SEAL]

Department of Energy
Oak Ridge Operations
P.O. Box E
Oak Ridge, Tennessee 37831

September 24, 1987

Mr. Bert Jody, Jr.
President
Nuclear Transport &
Storage, Inc.
P. O. Box 2471
Paducah, Kentucky 42002-2471

Dear Mr. Jody:

FREEDOM OF INFORMATION ACT REQUEST

Please accept this in response to your Freedom of Information Act (FOIA) request dated June 24, 1987, which was modified by you as detailed in Ms. Espinoza's letter to you of August 12, 1987. The following information has been identified as being responsive to your modified request:

- With regard to item 1 of your request, the feed usage agreements and appendices, thereto, for the DOE following customers:

1. Contract No. DE-SC05-85UAO7089 with Baltimore Gas and Electric Company, as amended

2. Contract No. DE-SC05-86UAO7122 with Bernische Kraftwerke AG, as amended

3. Contract No. DE-SC05-87UAO7142 with The Cleveland Electric Illuminating Company, as amended

4. Contract No. DE-SC05-76UAO3066 with The Chugoku Electric Power Company, Inc., as amended
5. Contract No. DE-SC05-86UAO7124 with Compagnie Generale Des Matieres Nucleaires with the concurrence of The Euratom Supply Agency, as amended
6. Contract No. DE-SC05-86UAO7112 with Carolina Power & Light Company, as amended
7. Contract No. DE-SC05-85UAO7102 with Consolidated Edison Company of New York, Inc., as amended
8. Contract No. DE-SC05-82UAO7076 with Commonwealth Edison Company, as amended
9. Contract No. DE-SC05-87UAO7137 with Duquesne Light Company, as amended
10. Contract No. DE-SC05-86UAO7117 with Duke Power Company, as amended
11. Contract No. DE-SC05-85UAO7109 with Detroit Edison Company, as amended
12. Contract No. DE-SC05-85UAO7098 with Eldorado Resources Limited, as amended
13. Contract No. DE-SC05-76UAO3075 with European Atomic Energy Community, as represented by the Euratom Supply Agency, as amended
14. Contract No. DE-SC05-79UAO7021 with GPU Nuclear Corporation, as amended
15. Contract No. DE-SC05-79UAO7002 with Gulf States Utilities Company, as amended
16. Contract No. DE-SC05-79UAO7014 with The Hokkaido Electric Power Company, Inc., as amended

17. Contract No. DE-SC05-85UAO7104 with Houston Lighting & Power Company, et al., as amended

18. Contract No. DE-SC05-86UAO7107 with Illinois Power Company, et al., as amended

19. Contract No. DE-SC05-76UAO5180 with Public Service Company of Indiana, Inc., as amended

20. Contract No. DE-SC05-79UAO7024 with The Japan Atomic Power Company, as amended

21. Contract No. DE-SC05-79UAO7020 with Kyushu Electric Power Co., Inc., as amended

22. Contract No. DE-SC05-79UAO7028 with The Kansai Electric Power Company, Inc., as amended

23. Contract No. DE-SC05-76UAO5230 with Louisiana Power and Light Company, as amended

24. Contract No. DE-SC05-87UAO7144 with Nukem, Inc., as amended

25. Contract No. DE-SC05-85UAO7111 with Northern States Power Company, as amended

26. Contract No. DE-SC05-85UAO7110 with Nuken, Inc., as amended

27. Contract No. DE-SC05-85UAO7101 with Public Service Company of New Hampshire, et al., as amended

28. Contract No. DE-SC05-87UAO7132 with Ohio Edison Company, as amended

29. Contract No. DE-SC05-86UAO7123 with Omaha Public Power District, as amended

30. Contract No. DE-SC05-76UAO5222 with Pennsylvania Power and Light Company, as amended

31. Contract No. DE-SC05-87UAO7133 with Pennsylvania Power Company, as amended

32. Contract No. DE-SC05-86UAO7130 with Public Service Electric & Gas Company, as amended

33. Contract No. DE-SC05-85UAO7108 with Power Authority of the State of New York, as amended

34. Contract No. DE-SC05-80UAO7031 with Portland General Electric Company, as amended

35. Contract No. DE-SC05-76UAO5179 with Philadelphia Electric Company, as amended

36. Contract No. DE-SC05-86UAO7128 with Southern California Edison Company, et al., as amended

37. Contract No. DE-SC05-87UAO7139 with Southern Company Services, Inc., as amended

38. Contract No. DE-SC05-79UAO7009 with Tohoku Electric Power Company, Inc., as amended

39. Contract No. DE-SC05-87UAO7141 with The Toledo Edison Company, as amended

40. Contract No. DE-SC05-85UAO7113 with Union Electric Company, as amended

41. Contract No. DE-SC05-76UAO4961 with Virginia Electric and Power Company, as amended

42. Contract No. DE-SC05-87UAO7129 with Wisconsin Public Service Corporation, et al., as amended

43. Contract No. DE-SC05-86UAO7118 with Wisconsin Electric Power Company, as amended

- With regard to item 2 of your request, the following information is furnished:

  As of June 30, 1987, the U.S. Department of Energy held approximately 16,293,456 kilograms of natural uranium as UF_6 under the above identified feed usage agreements.

- With regard to item 4 of your request, the following information is furnished:

  As the question is understood by DOE staff, no such separate cost sheets exist. There are also no separate cost sheets for the storage of the "48G" and "48H" cylinders, as opposed to other customer feed cylinders. The accounting system does not normally provide such specific information. The uranium hexafluoride material covered by a feed usage agreement is not segregated at the gaseous diffusion plants. When material is delivered to the DOE facilities, title passes to the DOE and it loses its identity, except on paper. There is no separate accounting for any costs associated with the storage of this material. There is no connection between the feed usage agreements and the "48G" and "48H" cylinders that are supplied to feed suppliers. These cylinders are being provided to accommodate the DOE's need to store its own excess feed material. This need resulted from the operation of the gaseous diffusion plants at low power and the sale of uranium from the DOE's enriched preproduction inventory. Some material labeled as "feed usage agreement" uranium may have been delivered in the DOE cylinders, but as previously stated, once delivered this

material loses its physical identity and becomes DOE property.

The following information has been deleted from this transmittal:

- All feed usage agreement appendices and the portion of Article II, Paragraph 1, of the agreements which reveal delivery schedules and quantities of feed material on a customer by customer basis. Additionally, as all usage agreements have identical terms and conditions, except as noted herein, I am providing only one complete contract herewith. This does not constitute a denial of your request but is done as a matter of convenience only. The title page to each contract detailed above is in fact enclosed.

The withholding of the above information associated with each usage agreement and modifications thereto was done because it was determined that the withheld information was "Government Commercial Confidential Information" which, if released, would likely harm DOE's legitimate commercial interests.

The United States Uranium Enrichment Program is authorized and made a legitimate commercial interest of DOE by the Atomic Energy Act ("Act") of 1954, as amended, (42 U.S.C. § 2011 et. seq.). Pursuant to the Act, DOE has the statutory mission to enter into commercial contracts to supply uranium enrichment services and to provide related services to nuclear utilities (42 U.S.C. § 2201). Authorization to commence contracting on a commercial basis for uranium enrichment services was effective January 1, 1969. Such uranium enrichment services provide for the sale and distribution of uranium

enriched in the isotope U-235 for use as a fuel in commercial nuclear reactors. Contracts for the sale of enriched uranium have been negotiated between DOE and many nuclear utilities in the United States, Far East and Europe.

The United States uranium enrichment sales program provides a commercial-type service using a large industrial process. It is one of the very few Government programs which produces a commercial product for civilian consumption. Each of DOE's negotiations of the contracts for the sale of enriching services is conducted on a case-by-case basis to meet each customer's individual needs and to assure that our offer of contract terms and assured supply over a period of years is more attractive than our foreign competition.

Over the past few years, DOE's ability to maintain its sales base and fulfill the statutory requirements has been seriously challenged as a result of increased competition from TECHSNAB, owned by the Soviet Union and two European enriching consortia known as Eurodif and Urenco. Eurodif is a consortium made up of France, Spain, Belgium and Italy and has an enriching plant in France; and Urenco, which includes the Netherlands, Great Britain and Germany, with plants operating in the Netherlands, Great Britain and a plant under construction in Germany. As a result of the competition, DOE's share of the market dropped from 100% in 1974 to 46% in 1985. The issuance of the new Utility Services form of Contract on January 18, 1984, was designed to improve DOE's existing competitive position, to firm-up our country's market share, and to enhance future prospects for uranium enrichment to occur in the United States which has an affirmative impact on non-proliferation and balance of

payments. As a direct result of DOE's efforts, its market share has now recovered to approximately 53% of the world market.

DOE's foreign competitors have copied the terms of DOE's enrichment contracts, including their pricing provisions. Competition is very keen as DOE's competitors do not operate within the same Governmental constraints. Price is a significant competitive factor in the marketplace. DOE's competitors now, as in the past, are offering prices discounted from DOE's advertised price. Other than price and assured supply, the enriching customer is influenced in its selection of an enriching supplier by the contractual arrangement under which the services are provided. Since the price for DOE enrichment services has historically been uniform for all customers under the new US Contract and is already publicly known, the specific negotiated conversion terms contained in Appendix "A" to the US Contract and information which is conceptually linked to the enrichment contracts such as the usage agreements, are considered commercial confidential information as they provide one of the few areas for potential competitive advantage.

By letter of October 24, 1984, (a copy of which is attached), John R. Longenecker, Deputy Assistant Secretary for Uranium Enrichment, expanded the DOE policy guidance associated with the issuance of usage agreements. In pertinent part, he provided:

> "1. Usage agreements may be implemented with enrichment customers for those cases in which it is determined to be a significant factor in the determination of a customer in converting to the US contract.

2. Usage agreements may be utilized on a short-term basis to assist customers who have emergency needs in terms of feed material deliveries.

* * *

6. In general, the application of usage agreements should involve limited quantities of feed material and be offered to customers on a preferential basis. In this respect, DOE should not serve as a depository of a significant portion of the total feed material to be delivered to DOE's enrichment plants. Also, usage agreements should be applied on a priority basis first to customers who would not otherwise have converted to the US contract but did so because a usage agreement was made available, and secondly to those US contract holders who would increase their market share with DOE because of the usage agreement. Oak Ridge shall establish the terms and conditions for usage agreements as may be necessary to implement the above policy."

Pursuant to these guidelines, in 1984 DOE increased the amount of feed in existing usage agreements and agreed to provide new agreements to customers not already having one in order to increase conversions to the Utility Services Contract. In recent negotiations to achieve additional sales through advance customer commitments under the incentive Pricing I and II Proposals, usage agreements were provided to customers or additional deliveries were authorized under existing usage agreements where it was determined to be a significant factor in the decision of a customer to purchase additional material from DOE under one of the Incentive Price offerings. Further, DOE has used the usage agreement as a

positive competitive feature in cases where it has been necessary to provide a customer this particular ancillary service as an important aspect in tying the customer to DOE for the long-term. The provision of such services continues to be necessary, especially as a result of unfavorable decisions involving DOE's ability to enrich foreign-origin uranium for domestic end use.

Considering the above, it is my judgment that release of portions of the contract information considered to be confidential commercial information would frustrate DOE's ability to compete effectively in the Uranium enrichment market and to carry out its statutory mission. Accordingly, it is DOE's position that the specific information in Article II, Paragraph 1, and the usage agreement appendices is so conceptually intertwined with the overall negotiations associated with the customer's enrichment contract as to be inextricable with the enrichment contract appendices including modifications thereto, and is within the governmental commercial information privilege and thus exempt from mandatory release pursuant to exemption (5) of the Freedom of Information Act (5 U.S.C. § 552(b)(5)) as interpreted by the Supreme Court in *Federal Open Market Committee v. Merrill*, 443 U. S. 340 (1979).

It is my specific finding that the agreements are interagency memoranda within the meaning of exemption (5). I am advised by counsel that the Supreme Court in *Merrill* examined the Freedom of Information Act's legislative history and related statutes to ascertain the legislative intent concerning the Government commercial information data sought to be withheld. The *Merrill* majority read the language of Federal Rule of Civil Procedure 26(c)(7)

to establish a partial basis for a Government commercial information privilege under exemption (5). Rule 26(c)(7) provides that "a district court for good cause shown may order that a trade secret or other confidential research, development, or commercial information need not be disclosed or be disclosed only in a designated way." Although this qualified evidentiary privilege usually protects only private parties, the *Merrill* court commented "the federal rules . . . are fully applicable to the United States as a party . . . and we see no reason why the Government could not, in an appropriate case, obtain a protective order under Rule 26(c)(7) . . . ."

As stated above, much of the US Contract terms and conditions and the general terms and conditions of the conceptually linked usage agreements have already been released to the public and have not been held confidential. The generally available terms and conditions are those standard to each US Contract or agreement; however, they are in no respect adhesion contracts. As of this date, a number of DOE's domestic and foreign customers refused to convert from their existing requirements-type or fixed-commitment contracts. Even more importantly, a large market exists for both DOE and its competitors to sell additional uranium enrichment services. Within the specific terms of the Utility Services Contract, significant opportunities for adjusting requirements exist. Specifically, the contract provides that upon five (5) years' notice, customers may reduce their minimum commitment from 100% of requirements to a minimum of 70% of requirements. This flexibility was specifically included in the Utility Services Contract by the Secretary of Energy to assure that DOE is motivated to remain competitive with

other primary enrichment services suppliers. Additionally, the contract provides that the contract may be terminated free of charge with ten years' advance notice. This notice is now only seven years off for most customers as DOE has waived this notice for two years, thus making virtually 100% of DOE's market totally uncommitted after 1995. Finally, it should be noted that a large market of unconverted present customers and potential new customers remain both in the United States and throughout the world. This is especially true in Europe where DOE's present market share is less than 11%.

The agency is statutorily chartered to recover costs through the sale of enrichment services. Because of its depressed market share and because of the overall reduction of nuclear expansion, DOE has found it necessary in recent years to embark on an aggressive program of cost reduction. In this regard, DOE has initiated an intensive business attitude toward its costs associated with the uranium enrichment enterprise. Through this effort, DOE has been able to make significant improvements in the efficiency of the operation of its existing gaseous diffusion plants. In addition, in 1985 one of DOE's three gaseous diffusion plants was idled in response to loss of sales and in an effort to reduce costs. Further, in 1985 the multi-billion dollar Gas Centrifuge Enrichment Plant at Portsmouth, Ohio, which was a major DOE construction project, was terminated because of reduced demand and to reduce costs.

In the face of ambitious competitively priced suppliers, DOE is attempting to guarantee its remaining market share while at the same time expand its market share, if

possible, in order to reduce unit cost to existing customers. As DOE's sales base grows, its production costs can be averaged over the larger sales and unit costs to customers can be reduced. The Utility Services Contract, including the directly associated usage agreements, are major tools in this effort. Maintaining confidentiality of the information determined to have a competitive commercial value is an extremely important element in the continuation of the US enrichment enterprise.

Most important, while the new Utility Services Contract contains some standard clauses, its most distinctive feature is that it is tailored to meet the particular needs of each individual customer. Detailed intensive negotiations were and continue to be conducted on a customer-by-customer basis, and individual incentives have been necessary to encourage conversion to the new contract. Further, in 1985 and 1986, DOE advanced major marketing initiatives identified as Incentive Price I and Incentive Price II respectively seeking advance commitments through Fiscal Year 1995. During these initiatives, DOE offered enrichment services at marginal production costs to customers with commitments of less than 100%. In many of the contract and modification negotiations, DOE made particular concessions on a *quid pro quo* basis. These accommodations involve several of the most sensitive contractual terms, including (but not limited to) customers' termination rights, the use of customers' excess inventory to satisfy their requirements, the applicable terms for the exercise of the new adjustable tails option and, as relevant here, usage agreements which allow customers to deliver natural uranium in advance of

requirements. Sensitive terms have generally been consolidated in Appendix "A" to assure that the "Government commercial confidential" information is segregated from the standard terms and conditions of the contracts. DOE has itself held this material in confidence and has insisted that customers afford it the same treatment. Disclosure of the withheld information at the present time would seriously impair the Government's ability to remain competitive with the Europeans or the Soviets. Private businesses in a similar competitive position would not have to reveal this type of information. DOE is informed that its competitors require its customers to sign non-disclosure agreements concerning all terms and conditions of their contracts. DOE already forfeits significant competitive standing to both Eurodif and Urenco. The revealing of the sensitive information contained in the usage agreements is tantamount to a release of information contained in the Utility Services Contract because of the conceptual inextricability and would only further frustrate DOE's statutory obligation.

It is clear from the *Merrill* case that exemption (5) contemplates the occasional withholding of information on an indefinite basis (pre-decisional information), whereas the court assumed that competitive harm arising in the contractual negotiations would end with the awarding of the contract. There appears little doubt from a reading of the Congressional history of the Freedom of Information Act and the *Merrill* case that neither Congress nor the Supreme Court contemplated a situation where the Government was in free market commercial competition with competitors such as DOE, especially competitors from

abroad already enjoying significant advantages over an agency of the United States Government.

In general, the post-*Merrill* cases have limited the application of exemption (5) as indicated above; however, in the cases of *Hoover v. Department of the Interior*, 611 F.2d 1132 (5th Cir. 1980); *Shermco Industries v. The Secretary of the Interior*, 613 F.2d 1314 (5th Cir. 1980); and *Hack v. Department of Energy*, 538 F. Supp. 1098 (D.D.C. 1982), the courts have allowed the Government's data the same protection that a private party's data would have received under exemption (4).

Accordingly, the issue is then whether the exemption (5) privilege extends only to data generated incident to the award of a federal contract (meaning a purchase contract awarded pursuant to the Federal Acquisition Regulations). A strong argument can be made that *Merrill* also encompasses confidential commercial information compiled outside the acquisition process. First, the facts of *Merrill* are broader than its holding; the court implicitly acknowledged this tension by saying: "Although the analogy is not exact, we think that the requested records are substantially similar to confidential commercial information generated in the process of awarding a contract." Second, the *Merrill* court founded the new privilege on the broad language of Federal Rule of Civil Procedure 26(c)(7) which covers all "trade secrets or other confidential research, development or commercial information." Properly construed, therefore, exemption (5) should protect all Government commercial confidential data regardless of whether the data was generated incident to the award of a contract. The real issue is whether the information has sufficient commercial sensitivity such that

disclosure would significantly harm the Government's legitimate commercial interests (see 443 U. S. at 363). The commentators addressing this point agree that *Merrill* includes commercial information outside the acquisition setting (see *Belazis, The Government's Commercial Information Privilege: Technical Information in the FOIA's Exemption (5)*, 33 Ad. L. Rev. 415, 419 (1981); *Developments Under the Freedom of Information Act – 1979*, 1980 Duke Law Journal 139; *Federal Open Market Committee of the Federal Reserve System v. Merrill: Delayed Disclosure to Protect Government Interest Under the Freedom of Information Act*, 1980 Det. Coll. L. Rev. 669; *Recent Developments, Government Commercial and Precontractual Information Under Exemption (5) of the Freedom of Information Act: Merrill v. FOMC*, 60 B.U.L. Rev. 765 (1980); *Administrative Law – Freedom of Information Act – Exemption (5) Includes a Qualified Privilege for Commercial Information*, 25 Vill. L. Rev. 507 (1980). Further, the legislative history contains no limitation to Government contracts (see 443 U. S. at 357-359)).

Consistent with this, the *Merrill* court stated that the Government's exemption (5) commercial privilege parallels a private party's commercial privilege under FOIA's exemption (4). The analogy is complete because the Government should receive only the same protection as any other competitor when the Government descends into the marketplace. Consequently, it would appear that the cases interpreting exemption (4) provide appropriate guidelines for determining the limits of the Government's exemption (5) commercial privilege.

With all this in mind, a cautious conclusion seems fair to draw that information deemed by DOE to have competitive value, even after the execution of a bilateral, truly

negotiated contract, retains its commercial value and is exempt from mandatory disclosure. The DOE needs continued confidentiality of the withheld information in order to safeguard its valid business interest. DOE does believe, however, that the present case dealing with the competitive position of the U.S. Department of Energy concerning the sale of enriched uranium in a fully competitive setting is unique. The confidentiality of the exempted information plays a unique and vital role in the agency's statutorily entrusted duties. DOE's decision to seek exemption of this information is not taken lightly, as we are fully aware of the FOIA's requirement of prompt disclosure. In this regard, DOE is not seeking to rely on some vague "public interest" standard. DOE has seriously and completely reviewed all the information sought to be exempted from mandatory release and has determined that to release the information now or in the near future would undermine DOE's competitive position in the uranium enrichment marketplace.

I have also, herein, determined to withhold a small quantity of information that would at first blush appear to be historical. In certain contracts, information associated with prior fiscal year deliveries has been deleted. It is my decision that in the cases where it was withheld that it was so inextricably intertwined with the *quid pro quo* withheld elsewhere in the appendix as to be not segregable. The inextricability is conceptual and not physical in the sense that to release the historical information alone would make it inaccurate and false. The accuracy and meaning of the information is tied to future concessions

or commitments by the parties so as to make its separation conceptually worthless and harmful to DOE. Accordingly, it is my determination to withhold all Government commercially sensitive-information contained in the appendices, past, present and future, which if revealed would likely harm DOE's competitive position and thus its legitimate commercial interests.

In addition to the reasons stated above, substantially all of DOE's customers have asserted that the information withheld contains "trade secrets and commercial or financial information obtained from a person and privileged or confidential," as provided in 10 CFR Subsection 1004.10(b)(4), and is thus exempt from mandatory release. The withheld information reveals future, current and historical information on fuel cycles, feed deliveries and significant information regarding nuclear fuel procurement and fuel management. Divulgence of such information is likely to be prejudicial to a customer's negotiating position in future procurements for fuel cycle services. Experience has demonstrated that public disclosure of procurement information can severely undermine a customer's negotiating position vis-a-vis prospective vendors or suppliers in that it can provide an unfair competitive advantage to other entities engaged in negotiations for the sale, purchase and processing of reactor fuel. Generally, the customers can think of no other information that has a better claim to the description commercial or financial information that is of a confidential nature. What is more, the utilities have informed DOE that information as to the supplier, the pricing mechanism, quantities, existing inventories, schedules and, in some cases, origin of material are provided to the DOE

Energy Information Administration pursuant to 10 CFR 761.8(a). This information which in many cases is similar to information withheld herein, has been categorized by EIA in advance as generally being confidential commercial information and that pursuant to 10 CFR Subsection 761.8(b) "will be kept confidential to the maximum extent permitted by the FOIA. . . ."

As a further note, DOE customers are aware that its competitors can and do assure strict confidentiality of similar information in their contracts. Disclosure of such information by DOE would jeopardize DOE's ability to secure such information in the future through the loss of business. In as much as the enrichment market is very small, with only four major enrichers, the gains of one enricher are at the direct expense of another. DOE will likely be viewed as a less desirable supplier if required to reveal the sensitive terms and conditions of its contracts.

Finally, according to many customers, the negative competitive impact which they would incur as a result of disclosure would be passed on to affiliates and customers in the form of higher power rates. The cause and effect relationship upon public interest could not be clearer or more direct.

In conclusion, DOE believes there is a significant and continuing commercial purpose to be served by withholding the portions of the contracts determined to be government commercial confidential information and commercial or financial information obtained from a person and privileged or confidential. To do less would be to undermine DOE's business position and jeopardize the performance of its statutory duty.

I have examined the information sought to be exempted by both DOE and its customers and have applied the rule of segregability, have considered the nature of the information still in question and the likelihood of competitive harm resulting from disclosure, and have independently determined that I may invoke the exemption for confidential commercial or financial information, and for commercial or financial information obtained from a person, and privileged or confidential. Where whole pages of information have been deleted, nonexempt information was so inextricably intertwined with exempt information that attempts at separation would have yielded no meaningful information.

I, as the "Authorizing Official" of DOE-ORO, am the person responsible for making the above determination to deny your request for the specified portions of the enumerated documents. My position title within DOE is Assistant Manager for Administration, Oak Ridge Operations, Department of Energy.

My determination to deny a portion of your request is an initial denial. DOE procedures (10 CFR 1004.10) provide that any person whose request under the FOIA is denied in whole or in part, or who is informed that requested documents do not exist, shall have the right to appeal such initial denial to the Office of Hearings and Appeals. Appeals are required to be by written notice addressed to the Director, Office of Hearings and Appeals, Department of Energy, 2000 M Street, N.W., Washington, DC 20461, within thirty (30) days of receipt of the initial denial letter. Both the envelope and letter must be clearly marked "Freedom of Information Appeal." Judicial review is available after appeal in the district in which

you reside or have a principal place of business, or in which the records are situated, or in the District of Columbia.

As the costs associated with providing the enclosures do not exceed DOE's *de minimus* rule, there is no charge associated with responding to your request.

Sincerely,

/s/ P. T. Marquess
P. T. Marquess
Authorizing Official
Assistant Manager
for Administration

CC-10:DGD

Enclosures

EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

NUCLEAR TRANSPORT & STORAGE, INC., Plaintiff, v. UNITED STATES OF AMERICA, acting through its DEPARTMENT OF ENERGY; *et al.*, Defendants.	)	CIVIL NO. 3-88-304

JOINT AFFIDAVIT

STATE OF TENNESSEE)
) ss:
COUNTY OF KNOX)

J. C. Winkles and H. J. McAlduff, Jr., being first duly sworn depose and say:

1. We have personal knowledge of the matters herein stated.

2. Concerning J. C. Winkles, between mid-1952 and December 1975 I served in the Chief Counsel's Office of the Oak Ridge Operations Office of the Atomic Energy Commission ("AEC") and its successor agency, the Energy Research and Development Administration ("ERDA"). From approximately 1963 to my retirement in December 1975, I was Deputy Chief Counsel of the Oak Ridge Operations Office. During my career at the AEC and ERDA, I was responsible for drafting the first set of uranium enrichment services criteria. In addition, I was

also responsible for drafting the first versions of numerous enrichment services contracts used by the AEC and ERDA. These included the first "requirements" contract, the first "firm quantity" contract and the first "long term fixed commitment" contract concerning uranium enrichment services. In addition, I was responsible for drafting the first "holding agreements" utilized by the agencies. Further, during my career I served on numerous task forces, committees and boards concerned with different phases of the government's enrichment program. Since my retirement in December 1975, I have served in a consultant capacity to various corporations and other entities engaged in various aspects of the nuclear field.

3. Concerning H. J. McAlduff, Jr., between October 1947 and April 1952 I served in the Health Physics Division of the Oak Ridge National Laboratories in Oak Ridge, Tennessee. From April 1952 until 1960 I served in various positions in the Oak Ridge Operations Office of the AEC. Between 1960 and my retirement in August 1980 I served in the enrichment program first as the AEC Materials Leasing Officer concerning special nuclear materials. Thereafter, for the bulk of the period between 1960 and 1980 I served as Chief of the Toll Enriching Branch, Production Division of the Oak Ridge Operations Office of the AEC, ERDA and DOE. In the capacity of Chief of the Toll Enriching Branch I was in charge of all aspects of the administration of the government's enrichment program in the United States and foreign countries. Upon retirement from DOE in August 1980 I was employed for five (5) years by Nuclear Resources International of Atlanta, Georgia which is a consulting firm for the nuclear industry. Between 1985 and 1987 I served as

Senior Advisor to Martin Marietta in their enrichment operations office in Oak Ridge, Tennessee.

4. As a result of our long standing association with the enrichment program of DOE and its predecessor agencies, we are familiar with the policies and practices of DOE and its predecessor agencies. During our careers with DOE and its predecessor agencies, the government consistently maintained a firm policy of not competing with the private sector in the provision of services related to the nuclear field. This policy was articulated within the agencies on numerous occasions by officials of the agencies. In addition, the agencies made this policy manifest to the public by not competing with the private sector as the private sector took over more and more nuclear functions which had originally been provided only by the government. Indeed, for many years, the AEC and its successor agency (ERDA) had as a part of the headquarters organization a Division of Industrial Development, whose principal function was to review overall activities to determine when and how all aspects of the nation's peacetime nuclear program could be placed fully in the hands of the private sector.

5. On November 13, 1987, at the request of Nuclear Transport & Storage, Inc. ("NT&S"), we met in Oak Ridge, Tennessee with various DOE personnel concerning feed usage agreements and their affect upon NT&S. At that time we met with DOE officials Jim Hall and Clark Huffman as well as with DOE attorney David Darough. These gentlemen indicated to us at that time that they were aware of the recently expanded use of feed usage agreements concerning DOE enrichment customers, and acknowledged to us that such agreements were necessary

to make DOE competitive in the eyes of enrichment service customers.

6. We have carefully reviewed the "Declaration of Kermit O. Laughon" previously filed by the Defendants. We make the following observations concerning Mr. Laughon's declaration. As may be seen from the final sentence of Paragraph 4 of Laughon's declaration, DOE has always had ample feed material available to it under its enrichment contracts to meets its delivery schedules under its enrichment contracts.

7. Concerning Paragraph 5 of Laughon's declaration, to the best of our knowledge – and contrary to Laughon's declaration – DOE has not entered into usage agreements over the past fifteen (15) years. Indeed, we cannot recall negotiating or drafting a single usage agreement during our respective government careers. Negotiating and drafting such agreements would have been a function of our respective offices.

8. Concerning Paragraph 6 of Laughon's declaration, this paragraph shows how feed usage agreements tie in with, and are part and parcel of, the overall enrichment contracts. The fact that title to feed material passes to DOE and the government has unrestricted use of the material under usage agreements is not unique to the feed usage agreements. Such passage of title coupled with unrestricted use by the government is a feature contained in the standard enrichment contracts entered into by DOE. The only additional term which a usage agreement adds to the relationship existing between DOE and its enrichment contract customers is the ability of the

customer to deliver his feed material ahead of his contracted delivery dates and in advance of the government's need for the feed material. Thus, the customer receives free storage of feed material which could not have been achieved under the enrichment contract. This feature has been particularly important to DOE enrichment services customers who, over the last several years, have been faced with greatly reduced need for enriched fuel while being tied into long term contracts for fixed amounts of feed material.

9. Concerning Paragraph 7 of Laughon's declaration, "holding agreements" have no relevance by way of analogy to feed usage agreements. Holding agreements have been used by DOE on only a spot basis covering relatively short periods of time. They in no way compare to long term, multi-year usage agreements which allow continuous early delivery of feed material over the life of an enrichment contract by a utility customer.

10. Concerning Paragraph 8 of Laughon's declaration, while it is true that feed usage agreements do not *expressly* mention free storage, the acceptance by DOE of feed material years in advance of need for the material by either the government or the enrichment customer constitutes free storage of such feed material.

/s/ J.C. Winkles
J.C. WINKLES

/s/ H. J. McAlduff, Jr.
H. J. MCALDUFF, JR.

Sworn to and subscribed before
me this 27th day of October,
1988.

/s/ Cynthia G. Sharik
NOTARY PUBLIC

My Commission Expires: 11/26/88